

No. 10580

United States
Circuit Court of Appeals
For the Ninth Circuit.

HARTFORD ACCIDENT AND INDEMNITY
COMPANY, a corporation,

Appellant,

vs.

EDWARD J. JASPER, Administrator of the
Estate of Emmet C. Jasper, deceased, AL-
BERT BROWN and CHARLES M. DAKE,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

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PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD:

JAMES ARTHUR POWERS,

610 American Bank Bldg.,
Portland, Ore.,

for Appellant.

McCAMANT, KING & WOOD,

American Bank Bldg.,
Portland, Ore.,

for Appellee.

person operating said insured vehicle is covered by said policy of insurance unless such person is operating it with the actual permission of the named insured;

VI.

That on or about June 26, 1942, and at a time when said policy of insurance was in force and effect, Charles M. Dake, one of the above named defendants, was involved in a collision with another car while operating said pick-up truck in Clatsop County, Oregon; that he was on a personal mission of his own at the time and was using said pick-up truck without the permission of Harold E. Wells, the named insured in said policy; that as a result of said collision Emmett C. Jasper, one of the occupants of the other car involved in the collision, came to his death, and Emmett Jasper, Jr., Harold J. Heikkale and Albert Brown allegedly sustained certain personal injuries and the automobile in which they were riding was damaged; [2]

VII.

That as a result of said collision, death, injuries and damage, claims have arisen and one action claiming \$10,000.00 damage has been commenced by Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, against Harold E. Wells, the named insured, and Charles M. Dake, the operator of said pick-up truck, in the Circuit Court of the State of Oregon for Clatsop County;

VIII.

That the defense of said action has been tendered to the plaintiff on behalf of Charles M. Dake by Harold E. Wells, the named insured in said policy by forwarding to plaintiff the summons and complaint therein which had been served upon said defendant Charles M. Dake; that said Charles M. Dake was served with said summons and complaint in Clatsop County, Oregon, while in custody of the Sheriff of said County and with directions from the person making service on behalf of the plaintiff therein to forward said summons and complaint to the plaintiff as the insurance carrier on said pick-up truck, and the plaintiff's attorneys in said action also forwarded a copy of the summons and complaint in that action directly to the plaintiff at its office in the Spalding Building, Portland, Oregon. The plaintiff in said action and the other named claimant defendants herein seek finally to recover from the plaintiff herein under the afore-said policy for said death and other injuries arising out of said collision and assert in that connection that plaintiff under its said policy of insurance is liable for the negligent acts of said Charles M. Dake in the operation of said pick-up truck. Plaintiff asserts that it has no liability under its said policy of insurance arising out of the operation of said pick-up truck by the said Charles M. Dake at the time and place of said collision and no liability under its said [3] policy for any damages that may be awarded to any of the defendants flowing therefrom, and that because thereof there now exists a

justiciable controversy between the plaintiff and defendants herein.

IX.

That the said Charles M. Dake has admitted his negligence and his liability therefor in connection with said collision;

X.

That it is plaintiff's belief that the said Charles M. Dake is without funds or other assets sufficient to pay any judgment that may be entered against him arising out of the several claims referred to and that the several claimants intend, after the entry of judgment against said Charles M. Dake, to proceed directly against plaintiff on its policy of insurance to try to recover thereon for the said negligent acts and resulting personal liability of the said Charles M. Dake;

XI.

That Edward J. Jasper is the duly appointed administrator of the estate of Emmett C. Jasper, deceased.

Wherefore, plaintiff demands that the Court adjudge:

1. That said defendant Charles M. Dake was on a personal mission of his own at the time said death, injuries and damage occurred and that he was using said pick-up truck at said time and place without actual permission of Harold E. Wells, the named insured in said policy, and without authority from Harold E. Wells to so use it.

2. That the plaintiff herein under the terms of

said policy is not obligated to defend said action on behalf of the said Charles M. Dake and is not obligated to pay any judgment that may be entered against said Charles M. Dake in said State Court action and that the plaintiff likewise and for the same [4] reasons is not liable under its said policy of insurance to the defendants Emmett Jasper, Jr., Harold J. Heikkale and Albert Brown, respecting their alleged claims for personal injury and/or for property damage and that the plaintiff herein has no obligation under its said policy of insurance to defend any action or actions commenced by any of said claimants against said Charles M. Dake.

3. That the plaintiff have its costs herein.

JAMES ARTHUR POWERS

Attorney for Plaintiff

[Endorsed]: Filed Aug. 11, 1942. [5]

[Title of District Court and Cause.]

**ANSWER OF DEFENDANT EDWARD J.
JASPER, ADMINISTRATOR OF THE
ESTATE OF EMMETT C. JASPER, DE-
CEASED**

Comes now the defendant Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, and for answer to plaintiff's claim for a declaratory judgment herein, admits, alleges and denies as follows:

I.

Admits the allegations of paragraph I.

II.

Admits the allegations of paragraph II.

III.

Admits the allegations of paragraph III.

IV.

Admits the allegations of paragraph IV.

V.

Denies that by and in the terms of said policy the protection and coverage thereof are limited to the said Harold E. Wells and to any other person operating the said insured pick-up truck with the actual permission of the named insured, and denies that no person operating said insured vehicle is or was covered by said policy of insurance unless such person is or was operating it with the actual permission [6] of said named insured.

Admits the remaining allegations of paragraph V.

VI.

Denies that on or about June 28, 1942, at the time of said collision, defendant Charles M. Dake was on a personal mission of his own and was using said pick-up truck without the permission of Harold E. Wells, the named insured in said policy.

Admits the remaining allegations of paragraph VI, except this defendant alleges that the true and correct name of said Emmett Jasper, Jr., is Edward Jasper.

VII.

Admits the allegations of paragraph VII.

VIII.

Admits that this answering defendant, who is the plaintiff in the said action referred to, and such other of the defendants as may have claims as the result of said accident, will seek finally to recover from the plaintiff under the said policy for the said death and other injuries arising out of said collision provided that a judgment or judgments therefor first be secured by this answering defendant or other of the defendants herein against either or both the said Charles M. Dake and Harold E. Wells, the named assured in the said policy, and if an execution or executions thereon shall be returned unsatisfied, either in whole or in part, at that time will assert that plaintiff under its said policy of insurance is liable for the negligent acts of the said Charles M. Dake in the operation of the said pick-up truck.

Admits the remaining allegations of paragraph VIII.

IX.

Admits the allegations of paragraph IX. [7]

X.

This answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation of plaintiff's belief that the said Charles M. Dake is without funds or other assets sufficient to pay any judgment that may be

entered against him arising out of any of said claims, and therefore on information and belief denies the same.

Admits that this answering defendant, and possibly also some of the other defendants, if a judgment or judgments are obtained against either or both the said Charles M. Dake and Harold E. Wells and an execution or executions thereon returned unsatisfied, will seek recovery on the said policy of insurance.

XI.

Admits the allegations of paragraph XI.

For a first further and separate answer and defense to plaintiff's claim, this answering defendant alleges that said claim fails to state a claim against this answering defendant upon which relief can be granted, in that there is now pending, but not yet tried or decided, in the Circuit Court of the State of Oregon for the county of Clatsop, an action at law entitled "Edward J. Jasper, administrator of the Estate of Emmett C. Jasper, Deceased, Plaintiff, vs. Harold E. Wells and Charles M. Dake, Defendants," that the Charles M. Dake named as one of the defendants in said action is one of the defendants herein, and that the Harold E. Wells named as one of the defendants in said action is the named insured in said policy of insurance. [8]

A full, true and correct copy of the complaint in said action is hereto attached marked "Exhibit A" and by reference thereto made a part hereof. A full, true and correct copy of the answer of the defendant Charles M. Dake in said action is hereto

attached marked "Exhibit B" and by reference thereto made a part hereof. A full, true and correct copy of the answer of the defendant Harold E. Wells in said action is hereto attached marked "Exhibit C" and by reference thereto made a part hereof.

The issues sought to be raised by plaintiff herein by and in its claim are the same issues involved in said pending action, and the plaintiff herein has available to it an adequate remedy in the said action. This answering defendant is informed and believes, and on information and belief alleges that plaintiff by and through its own attorneys has the direction and control of said pending action.

The determination by the court of the issues and questions sought to be raised by plaintiff in its claim herein would require investigation by the court of disputed facts already in issue in said pending action.

For a second further and separate answer and defense to plaintiff's claim, this answering defendant alleges that said claim fails to state a claim against this answering defendant upon which relief can be granted, in that the said Harold E. Wells, the named insured in the said policy of insurance, is a necessary party to this cause but has not been made a party thereto, and without his presence herein a complete determination of this cause cannot be made. [9]

For a third further and separate answer and defense to plaintiff's claim, this answering defendant alleges that said claim fails to state a

claim against this answering defendant upon which relief can be granted, in that the defendants Harold J. Heikkale and Edward Jasper, herein attempted to be impleaded as "Emmett Jasper, Jr.," are each and both of them in the armed services of the United States of America, no service of process in this cause has been made upon either of them, and the jurisdiction of this court over either and both of them is limited by the provisions of the federal Soldiers' and Sailors' Civil Relief Act of 1940, and each and both of them are necessary parties to this cause, and without the presence of each and both of them herein a complete determination of this cause cannot be made.

An affidavit executed by Charles W. Halderman in support of the allegations of this third further and separate answer and defense is attached to and made a part of the answer of defendant Albert Brown herein, marked "Exhibit A."

Wherefore, having fully answered plaintiff's claim, this answering defendant prays that plaintiff take nothing thereby, but that the same be dismissed and that this answering defendant have and

recover his costs and disbursements herein of and from the plaintiff.

CHARLES W. HALDERMAN
HESSE & FRANCISOVICH

Address: 403 Spexarth Building,
Astoria, Oregon

McCAMANT, KING & WOOD
BORDEN WOOD

Address: 926 American Bank
Building, Portland, Oregon [10]

If a trial of any issues raised or attempted to be raised in the above entitled and numbered cause is had, this answering defendant demands a jury trial.

BORDEN WOOD

Of Attorneys for Defendant
Edward J. Jasper, Administrator of the Estate of
Emmett C. Jasper, Deceased

[11]

EXHIBIT A

In the Circuit Court of the State of Oregon
for Clatsop County

EDWARD J. JASPER, administrator of the
Estate of Emmett C. Jasper, deceased,
Plaintiff,

vs.

HAROLD E. WELLS and CHARLES M. DAKE,
Defendants.

COMPLAINT

Comes now above named plaintiff and for cause
of action against defendants alleges:

I.

That heretofore, on or about the 28th day of June, 1942, one certain Emmett C. Jasper died intestate at the age of 21 years, unmarried, without leaving any surviving widow or children or adopted children, or lineal heirs or dependents, and that thereafter to-wit on the 10th day of July, 1942, plaintiff herein, by consideration of the County Court of the State of Oregon was duly appointed as administrator of his estate, and thereafter duly qualified, and thereafter to-wit on the 10th day of July, 1942, Letters of Administration in said estate were duly issued to him, and have not since been revoked, and that ever since plaintiff herein has been and now is the duly appointed, qualified and acting administrator of said Emmett C. Jasper, deceased.

II.

That during all of the several times hereinafter mentioned the Wolf Creek Highway was and now is one of the duly laid out, dedicated and improved highways of the State of Oregon, running through Clatsop County, Oregon, in a general easterly and [12] westerly direction, but at the locality in question running practically on a level grade in a general northwesterly-southeasterly direction and in a straight course for several hundred feet on either side of the point of collision hereinafter mentioned, improved with a hard surfaced pavement 26 feet in width divided into 2 lanes for traffic in opposite directions, with a clearly marked yellow center line, with rock shoulders several feet wide running along each side, and that the particular locality in question where the hereinafter mentioned collision occurred was neither a business nor residential district as defined by the Oregon Motor Vehicle Act then in full force and effect, but open country still in its original state of Nature.

III.

That heretofore, to-wit, on the 20th day of June, 1942, at about eleven o'clock P. M., deceased was riding as an occupant in a certain Dodge 5 passenger Sedan automobile bearing Oregon license #274-400 for the year of 1942, which was then and there being operated in Clatsop County, Oregon, when the pavement of said highway was dry, over and along said Wolf Creek Highway on the northerly half thereof in a northwesterly direction.

IV.

That during all of the several times hereinbefore and hereinafter mentioned defendant herein, Harold E. Wells, was the owner of a certain International pick-up delivery truck, bearing Oregon license #89-876 for the year of 1942, which at the time heretofore and hereinafter mentioned, and for some time and distance immediately prior thereto, was being operated by said defendants in a general Southeasterly direction over and along said Wolf Creek Highway in an opposite direction to the car in which the deceased was so riding as aforesaid.

[13]

V.

That when said truck so operated by defendants as aforesaid had reached a point on said Wolf Creek Highway about 1000 feet east from the logging road trestle of the Oregon-American Lumber Corporation, and for some time and distance immediately prior thereto, defendants herein carelessly, negligently and recklessly failed to maintain a proper or any lookout for care approaching from the opposite direction, and carelessly, negligently and recklessly drove and operated said truck at an unreasonable and imprudent rate of speed, considering the traffic, surface and width of said highway and other hazards and conditions then and there existing, and carelessly, negligently and recklessly failed to have their truck under proper or any control and without being able to decrease the speed thereof, or to stop the same so as to avoid collision with other vehicles then and there using said high-

way, and particularly with the automobile in which the deceased was so riding as aforesaid, and carelessly, negligently and recklessly failed to drive their said truck upon their right half, or southerly half of said highway, although the same was in good state of repair and in traversible condition, and carelessly, negligently and recklessly drove their said truck with portions thereof protruding over the yellow center line and over the northerly half of said highway, and carelessly, negligently and recklessly failed to drive their said truck as closely as practicable to the right hand edge of said highway, although they were not then overtaking or passing or traveling parallel with another vehicle and were not then and there placing their said truck in a position to make a left hand turn, and carelessly, negligently and recklessly failed to either dim or dip the rays of the headlights of their said truck so as to not [14] project the glaring rays thereof into the eyes of the driver of the automobile in which deceased was riding, and carelessly, negligently and recklessly brought their said truck in violent collision with the automobile in which deceased was so riding in Clatsop County, Oregon, as aforesaid; and that as a direct and proximate result of defendants' said negligence the said Emmett C. Jasper received serious injuries from the effects of which he died a few minutes later.

VI.

That prior to his death the deceased was a strong, healthy young man with a life expectancy of 41.53

years, was energetic, industrious, temperate, economical, or saving habits and capable of rendering services for compensation to others, and had he outlived his life expectancy would have accumulated savings and left an estate in excess of \$10,000.00, and that by reason of defendants so wrongfully and prematurely causing the death of said Emmett C. Jasper, the said estate has been damaged in the sum of Ten Thousand Dollars.

Wherefore, plaintiff prays judgment of this Court against defendants in the sum of Ten Thousand Dollars and for his costs and disbursements incurred herein.

CHARLES W. HALDERMAN
HESSE & FRANCISOVICH
Attorneys for Plaintiff. [15]

EXHIBIT B

In the Circuit Court of the State of Oregon
for the County of Clatsop

EDWARD J. JASPER, administrator of the
estate of Emmett C. Jasper, Deceased,
Plaintiff,

vs.

HAROLD E. WELLS and CHARLES M. DAKE,
Defendants.

ANSWER

Comes now Charles M. Dake, one of the defendants herein, and answering unto the complaint of

the plaintiff herein, admits, denies and alleges as follows:

I.

Admits paragraphs I, II, and III thereof.

II.

Answering unto Paragraph IV thereof, admits that Harold E. Wells was the owner of the truck mentioned therein, but denies all other parts and portions of the said paragraph and the allegations therein contained, save and except as is hereinafter affirmatively set forth.

III.

Answering unto paragraph V thereof, defendant denies the same and all of the allegations therein contained, save and except as is hereinafter affirmatively alleged and set forth.

IV.

Answering unto paragraph VI thereof, defendant denies the same.

For a further and separate answer and defense, this defendant alleges:

I.

This defendant alleges that he was negligent as is set [16] forth in plaintiff's complaint but alleges that said negligence was his sole act and that although he was using the truck of the said Harold E. Wells at the time and place alleged in the complaint, that he was not at the said time and place an agent, employee or servant of defendant Harold

E. Wells nor was he driving said truck with the permission of said Harold E. Wells, either directly or impliedly but that he was operating said automobile in defendants absence and without his permission or consent, either express or implied.

Wherefore, having fully answered plaintiff's complaint, this defendant prays that plaintiff take nothing thereby and that he be awarded his costs and disbursements herein.

NORBLAD AND NORBLAD

Attorneys for the defendant,
Charles M. Dake. [17]

EXHIBIT C

In the Circuit Court of the State of Oregon
for the County of Clatsop

EDWARD J. JASPER, administrator of the
Estate of Emmett C. Jasper, Deceased,
Plaintiff,

vs.

HAROLD E. WELLS and CHARLES M. DAKE,
Defendants.

ANSWER

Now comes Harold E. Wells, one of the above named defendants, answering unto complaint of plaintiff herein, admits, denies, and alleges as follows:

I.

Admits paragraphs I, II and III of plaintiff's complaint.

II.

Answering unto paragraph IV thereof, this defendant denies all parts and portions thereof, save and except this defendant admits that he was the owner of the International truck therein described.

III.

Answering unto paragraph V and VI thereof this defendant denies the same and all parts and portions thereof save and except as is hereinafter affirmatively set forth.

For further separate answer and defense, this defendant affirmatively alleges as follows:

I.

That although this defendant's said truck was being used and driven negligently at the time and place alleged in the complaint by Charles M. Dake, that the said Charles M. Dake was not then and there in the employ of this defendant, nor was he at that time and place an agent, employee or servant of this defendant, nor was he driving this truck with this defendant's permission or consent [18] either express or implied, but that he was operating the said track in the absence of this defendant and without his permission or consent either express or implied.

Wherefore, having fully answered unto plaintiff's complaint this defendant prays that plaintiff take nothing thereby and that he be awarded his costs and disbursements incurred herein.

NORBLAD & NORBLAD

Attorneys for Defendant

Harold E. Wells

[Endorsed]: Filed Sept. 1, 1942. [19]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This matter coming on for pre-trial conference before the Honorable Claude McColloch, judge of the above entitled court, the plaintiff appearing by James Arthur Powers, its attorney, and the defendants, Edward J. Jasper, administrator of the estate of Emmett C. Jasper, and Albert Brown, appearing by Borden Wood and Robert S. Miller, of their attorneys, as said pre-trial conferences.

I.

The following pre-trial exhibits were introduced by plaintiff and numbered as follows:

1. Letter from Charles M. Dake to Harold E. Wells. Objection reserved on the grounds of incompetency, irrelevancy and immateriality.
2. Policy No. A47,619, issued to Harold E. Wells by plaintiff.
3. Reservation of rights agreement. Objection

reserved on the grounds of incompetency, irrelevancy and immateriality.

9. Judgment roll of proceedings entitled, Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, plaintiff, vs Harold E. Wells and Charles M. Dake, defendants, which action was tried in the Circuit Court of the State of Oregon for Clatsop County. Objection reserved on the grounds of incompetency, irrelevancy, and immateriality. [31]

10. Transcript of testimony in the case mentioned in number 9. Objection reserved on the grounds of incompetency, irrelevancy and immateriality.

II.

The following pre-trial exhibits were introduced by defendant and numbered as follows:

4. Affidavit re citizenship of certain defendants.

5. Copy of answer of defendant, Harold E. Wells, in action entitled, Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, plaintiff, vs Harold E. Wells and Charles M. Dake, defendants, which action was tried in the Circuit Court of the State of Oregon for Clatsop County. Objection reserved on the grounds of incompetency, irrelevancy and immateriality.

6. Reply of plaintiff to answer of Harold E. Wells in action mentioned in number 5 above. Objection reserved on the grounds of incompetency, irrelevancy and immateriality.

7. Answer of defendant, Charles M. Dake, in

action mentioned in number 5 above. Objection reserved on the grounds of incompetency, irrelevancy and immateriality.

8. Reply of plaintiff to answer of Charles M. Dake in action mentioned in number 5 above. Objection reserved on the grounds of incompetency, irrelevancy and immateriality.

ADMITTED FACTS

It is admitted that the plaintiff herein conducted the defense of the action in the State Court in Clatsop County on behalf of defendants herein.

III.

It was admitted that plaintiff is a corporation organized and existing under the laws of the State of Connecticut, and as such is engaged in the insurance business. That it is duly authorized and licensed to carry on insurance business in the State of Oregon. That it is a citizen and resident of the State of Connecticut. It was further admitted that the defendants, and each of them, are residents of the State of Oregon, and that a diversity of citizenship exists between the plaintiff and defendants. That such diversity of citizenship did exist at the commencement of this action, and said diversity of citizenship has at all times since said time, and does now, exist. It was further admitted that the amount in controversy, exclusive of interest [32] and costs, exceeds the sum of Three Thousand (\$3,000) Dollars.

IV.

It was admitted that on or about January 5, 1942, plaintiff issued a policy of automobile insurance, Policy A-47619, to Harold E. Wells. That said policy was to be in effect for a period of one year from said date, and covered the operation of a certain 1940 model International pickup truck, owned by Harold E. Wells, bearing Oregon license number 89876.

V.

It was admitted that on or about June 28, 1942, at the time when said policy of insurance was in full force and effect, Charles M. Dake, one of the defendants, was involved in a collision with another car while operating said pickup truck in Clatsop County, Oregon.

It was admitted that as a result of said collision Emmett C. Jasper, one of the occupants of the other car involved in the collision, came to his death, and that Edward Jasper, herein impleaded as Emmett Jasper, Jr., and Harold J. Heikkale and Albert Brown allegedly sustained certain personal injuries when the automobile in which they were riding was damaged.

VI.

It was further admitted that as a result of said collision, death, injuries and damage claims have arisen, and one action claiming Ten Thousand (\$10,000) Dollars damage was commenced by Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, against said Harold E.

Wells, the named insured, and against said Charles M. Dake, the operator of said pickup truck, in the Circuit Court of the State of Oregon for Clatsop County. [33]

VII.

It was further admitted at said pre-trial conferences that the action mentioned in paragraph VI resulted in a verdict of the jury in favor of the plaintiff and against each of the defendants in the sum of Five Thousand (\$5,000) Dollars. It was further admitted that the court set aside the general verdict of the jury as against said Harold E. Wells, and entered a judgment in the said action in favor of the said Harold E. Wells and against the said Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased. It was further admitted that an appeal has been perfected from the order of said court setting aside said general verdict of the jury as against the defendant, Harold E. Wells, and from the judgment entered in said action in favor of the defendant, Harold E. Wells, and against the said Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased.

VIII.

It was further admitted that the said Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, and the other named claimant defendants herein will seek to recover from the plaintiff herein under the aforesaid policy for such claims as they may have for said death or other

injuries arising out of said collision, but only if a judgment or judgments therefor first be secured by said Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, or other of the defendants herein, against either or both the said Charles M. Dake and Harold E. Wells, and if an execution or executions thereon shall be returned unsatisfied, either in whole or in part, and in that event, the answering defendants will assert that plaintiff, under its said policy of insurance, is liable for the negligent acts [34] of the said Charles M. Dake in the operation of said pickup truck.

IX.

A jury trial was waived.

X.

The following issues remain for determination at the time of trial:

1. Whether or not this court has jurisdiction; defendant asserts that the said Harold E. Wells, the named insured, is an indispensable party to this cause but has not been made a party hereto. Plaintiff asserts that said Harold E. Wells is not an indispensable party.

2. Whether or not the said judgment entered in the action entitled, Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, plaintiff, vs Harold E. Wells and Charles M. Dake, defendants, which action was tried in the Circuit Court of the State of Oregon for the County of

Clatsop, is res adjudicata as to the defendant, Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased. Plaintiff asserts the issues decided therein are determinative of this action as against said defendant, Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, and that said defendants are barred from asserting their defenses herein for the reason that the same issue was tried and determined adversely in the Clatsop County action and therefore is an estoppel by judgment against them arising out of the directed verdict in the Clatsop County Action and the judgment entered thereon in favor of defendant Harold E. Wells. Said defendant asserts that the issues decided therein are not determinative of this action.

3. Whether Charles M. Dake is without funds or other assets sufficient to pay any judgment against him arising out of the several claims before mentioned. Plaintiff so alleged; defendant on information and belief denied the same.

4. Whether or not the actual use of said pickup truck at the time of the collision hereinbefore mentioned was with the permission of the named insured, to-wit: said Harold E. Wells.

The foregoing is certified to be a record of the proceedings had at the pre-trial of this cause, and it is

Ordered that the issues to be tried herein shall be those herein set forth as controverted issues.

Dated and entered this 29th day of January, 1943.

CLAUDE McCOLLOCH

United States District Judge.

JAMES ARTHUR POWERS

Attorney for Plaintiff

ROBERT S. MILLER

Of Attorneys for Defendants

[Endorsed]: Filed Jan. 29, 1943. [35]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above entitled and numbered cause coming on for trial before the court sitting without the intervention of a jury on January 29, 1942, plaintiff Hartford Accident and Indemnity Company, a corporation, appearing by James Arthur Powers, its attorney, and the defendants Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, and Albert Brown, appearing by Borden Wood and Robert S. Miller, of their attorneys, and the respective parties having introduced testimony, and based upon the stipulation of the parties and an order of this court certain additional evidence was introduced and made a part of the record herein, and

The court having heard the arguments and considered the briefs of respective counsels and deeming itself advised in the premises, makes the following

FINDINGS OF FACT

I.

That plaintiff was and is a corporation organized and existing under and by virtue of the laws of the State of Connecticut, and as such is engaged in the insurance business; [37] and that it is duly authorized and licensed to carry on insurance business in the State of Oregon; that it is a citizen and resident of the State of Connecticut.

II.

That the defendant Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, the defendant Albert Brown and the defendant Charles M. Dake, and each of them, are residents and citizens of the State of Oregon.

III.

There is now, and during all times mentioned in the pleadings herein, including the time of the institution of this cause, and at all times since the institution of said cause, there was a diversity of citizenship between plaintiff and the said defendants.

IV.

The matter in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00.

V.

On or about January 5, 1942, plaintiff issued a policy of automobile insurance, being its policy numbered A-47169, to Harold E. Wells; that said policy was in effect for a period of one year from said date, and covered the operation of a certain 1940 model International pickup truck, owned by Harold E. Wells, bearing Oregon license number 89876. The limits of liability in said policy are as follows: Bodily injury liability, \$10,000.00 each person; \$20,000 each accident. Property damage liability, \$5,000.00 each accident.

VI.

On or about June 28, 1942, at a time when said policy of insurance was in full force and effect, Charles M. Dake was involved in a collision with another automobile, at which time Charles M. Dake was operating said International pickup truck in Clatsop County, State of Oregon. [38]

VII.

That as a result of said collision mentioned in Paragraph VI hereof, Emmett C. Jasper, one of the occupants of the said other automobile involved in said collision, came to his death, and that Edward J. Jasper impleaded as Emmett C. Jasper, Jr., Harold J. Heikkle and Albert Brown allegedly sustained certain personal injuries when said other automobile in which they were riding was involved in said collision with the said International pickup truck, as hereinbefore mentioned in Paragraph VI hereof.

VIII.

That as a result of said collision, death, injuries and damage claims have arisen.

IX.

That Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, commenced an action in the Circuit Court of the State of Oregon for the County of Clatsop against Harold E. Wells and against Charles M. Dake for the recovery of the sum of \$10,000 damages; that said action resulted in special findings by the jury, a full true and correct copy of which is hereto attached marked "Exhibit A," and by reference made a part hereof; that said action resulted in a verdict by the jury, a full, true and correct copy of which is hereto attached marked "Exhibit B," and by reference made a part hereof; that thereafter a motion for judgment, notwithstanding the verdict of the jury, was filed, a full true and correct copy of said motion is hereto attached marked "Exhibit C," and by reference made a part hereof; that thereafter and on the 30th day of October, 1942, a judgment was entered in said action, a full, true and correct copy is hereto attached marked "Exhibit D," and by reference made a part hereof. [39]

X.

That the judgment entered in the action entitled Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, plaintiff, versus Harold E. Wells and Charles M. Dake, defendants,

which action was tried in the Circuit Court of the State of Oregon for Clatsop County, is not res adjudicata as to the defendant Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased; that the issues decided in said state court action are not determinative of this action; that the defendants are not barred from asserting their defenses herein; that the same issue or issues herein were not tried and determined in said state court action; that there is not an estoppel of judgment against the defendants as a result of the said judgment entered in said state court action.

XI.

That the defendant Harold E. Wells is not an indispensable party to this cause.

XII.

That Charles M. Dake is without funds or other assets sufficient to pay judgment against him arising out of the several claims aforementioned.

XIII.

That the actual use of the said International pickup truck by Charles M. Dake at the time of the collision hereinbefore mentioned, which is the automobile described in said policy of insurance issued by plaintiff and which policy is involved in this action, was with the permission of said Harold E. Wells, the named insured in said policy of insurance; that the actual use of said truck by the said Dake at the said time and said place of the

said collision was within the contemplation of said Harold E. Wells. [40]

XIV.

That plaintiff and defendants, and each of them, in open court waived a jury trial.

From the foregoing findings of fact, the court makes the following

CONCLUSIONS OF LAW

I.

The court has jurisdiction over this cause. At the time of the institution of said cause there existed, and at all times since the institution of said cause there existed and at the present time there exists a diversity of citizenship between the plaintiff and the defendants.

II.

The matter in controversy, exclusive of interest and costs, exceeds the sum and value of \$3,000.00.

III.

That the actual use of the said International pickup truck by Charles M. Dake at the time of the collision hereinbefore mentioned, which is the automobile described in said policy of insurance issued by plaintiff and which policy is involved in this action, was with the permission of said Harold E. Wells, the named insured in said policy of insurance; that the actual use of said truck by the said Dake at the said time and said place of the

said collision was within the contemplation of said Harold E. Wells.

IV.

That the judgment entered in the action entitled Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, plaintiff, versus Harold E. Wells and Charles M. Dake, defendants, which action was tried in the Circuit Court of the State of Oregon for Clatsop County, is not res adjudicata as to the defendant Edward J. Jasper, administrator of the estate of [41] Emmett C. Jasper, deceased; that the issues decided in said state court action are not determinative of this action; that the defendants are not barred from asserting their defenses herein; that the same issue or issues herein were not tried and determined in said state court action; that there is not an estoppel by judgment against the defendants as a result of the said judgment entered in said state court action.

V.

That judgment should be entered herein; that plaintiff take nothing by its action herein; and that defendants Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, and Albert Brown, and each of them, have and recover of and from the plaintiff their respective costs and disbursements incurred herein, and that said judgment declare the rights of the parties in accordance with the findings of fact and conclusions of law herein announced.

Dated this 21st day of April, 1943.

(Sgd.) CLAUDE McCOLLOCH

Judge [42]

EXHIBIT A

In the Circuit Court of the State of Oregon
for Clatsop County

EDWARD J. JASPER, etc.,
et al

Plaintiff,

vs.

HAROLD E. WELLS and
CHARLES M. DAKE,

Defendants.

SPECIAL FINDINGS

We, the Jury in the above entitled cause, make answer to the following requested special findings as follows:

1. Was defendant Dake at the time of the collision driving said pick-up delivery truck as the agent, servant or employee of defendant Wells and in pursuance of Wells' business? Yes.

2. Or, was defendant Dake at the time of the collision driving said pick-up delivery truck either with the express or with the implied permission or consent of defendant Wells on defendant Dake's own business? No.

3. Or, was defendant Dake at the time of the collision driving said pick-up delivery truck entirely without the permission or consent of defendant Wells and entirely on defendant Dake's own business? No.

HAROLD W. BELL

Foreman [43]

EXHIBIT B

In the Circuit of the State of Oregon
for Clatsop County

EDWARD J. JASPER, administrator of the
Estate of Emmett C. Jasper, deceased,

Plaintiff,

vs.

HAROLD E. WELLS and
CHARLES M. DAKE,

Defendants.

VERDICT

We, the jury, duly impaneled and sworn to try the above entitled action, find our verdict for the plaintiff and against the defendants, Harold E. Wells and Charles M. Dake, and each of them, and we assess plaintiff's damages in the sum of \$5,000.00.

HAROLD W. BELL

Foreman [44]

EXHIBIT C

In the Circuit Court of the State of Oregon
for the County of Clatsop

No. 16281

EDWARD J. JASPER, administrator of the
Estate of Emmett C. Jasper, deceased,
Plaintiff,

vs.

HAROLD E. WELLS and
CHARLES M. DAKE,
Defendants.

MOTION FOR JUDGMENT NOTWITHSTAND-
ING THE VERDICT OF THE JURY

Now comes the defendant, Harold E. Wells, by his attorney, A. W. Norblad, and moves the Court for an order and judgment setting aside the verdict rendered by the jury herein in favor of the plaintiff and against the defendant, Harold E. Wells, and for a judgment in favor of the defendant, Harold E. Wells, and against the plaintiff herein. This motion being followed upon the ground and for the reason that at the conclusion of the taking of the testimony herein and when both parties had rested herein, the defendant, Harold E. Wells, moves the Court that the jury be instructed to return a verdict in favor of the defendant, Harold E. Wells, and against the plaintiff upon the ground and for the reason that the plaintiff had not proven his cause of action against the defend-

ant, Harold E. Wells, and thereupon, the Court announced that in its opinion, said motion for a directed verdict was well taken and ought to be granted, but that the Court nevertheless at the request of the adverse party, upon a motion made for that purpose by Mr. F. C. Hesse, a counsel for plaintiff, would submit the case to the jury with leave to the moving party, Harold E. Wells, to move for judgment in his favor, if the verdict was otherwise would have been directed.

A. W. NORBLAD

Attorney for Defendant,
Harold E. Wells [45]

EXHIBIT D

In the Circuit Court of the State of Oregon
for Clatsop County

No. 16281

EDWARD J. JASPER, administrator of the
Estate of Emmett C. Jasper, deceased,
Plaintiff

vs.

HAROLD E. WELLS and
CHARLES M. DAKE,

Defendants

JUDGMENT

This cause having duly come on for trial on the 28th day of October, 1942, plaintiff appearing in

person and by his attorneys, Borden Wood, Charles W. Halderman, and Frank C. Hesse, and defendants and each of them appearing in person and by their attorneys, Norblad & Norblad, and a jury having been duly sworn and impaneled, and witnesses having been duly sworn and examined on behalf of all the parties, and the cause having been duly argued to the jury, and the jury having been duly instructed by the court as to the law, and the jury having returned into Court on the 29th day of October, 1942, at 9:30 P.M., with its verdict in favor of plaintiff in the amount of Five thousand Dollars (\$5000.00) against both defendants and each of them, and with its special verdict that defendant Dake at the time of the collision was driving said pickup delivery truck as the agent, servant or employee of defendant Wells, and in pursuance of Wells' business, and not with Wells' permission on the personal business of defendant Charles M. Dake and their said verdicts having been duly received by the Court and filed by the Clerk of the above entitled court, and attorneys for plaintiff at this time moving the Court for a judgment upon said verdicts;

Whereupon defendant Harold E. Wells, by and through his [46] attorneys moved the Court in accordance with the previous ruling of the Court to set aside said verdict as against him and to enter a judgment in his favor, which said motion the Court allowed, granting plaintiff an exception,

Now, Therefore, by virtue of the law and the premises it is hereby Ordered, Considered and

Adjudged, that plaintiff do have and recover of and from defendant Charles M. Dake the sum of \$5000.— and his costs and disbursements taxed herein in the sum of \$119.70, and that a writ of execution issue therefore,

And it is hereby further Ordered, Considered and Adjudged that plaintiff recover nothing of and from defendant Harold E. Wells and that he recover his costs and disbursements incurred herein, taxed in the amount of \$82.75 of and from plaintiff herein, and that a writ of execution issue there-fore.

Dated at Astoria, Oregon

October 30th, 1942.

ARLIE G. WALKER

Circuit Judge.

A true copy.

ROBERT S. MILLER

Of Attorneys for Defendants

Edward J. Jasper, Admin-
istrator, and Albert Brown.

Served 4/21/43.

[Endorsed]: Filed April 21, 1943. [47]

In the District Court of the United States
for the District of Oregon

Civil No. 1282

HARTFORD ACCIDENT AND INDEMNITY
COMPANY, a corporation,

Plaintiff,

vs.

EDWARD J. JASPER, Administrator of the
Estate of Emmett C. Jasper, Deceased; EM-
METT JASPER, JR.; HAROLD J. HEIK-
KALE; ALBERT BROWN and CHARLES
M. DAKE,

Defendants.

JUDGMENT

The above entitled and numbered cause having come on for trial before the court sitting without the intervention of a jury on January 29, 1943, plaintiff appearing by James Arthur Powers, its attorney, and defendants Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, and Albert Brown appearing by Borden Wood and Robert S. Miller, of their attorneys, and each party having introduced evidence and rested, and the court having considered the briefs of respective counsel and having made and entered herein findings of fact and conclusions of law in

favor of the said defendants and deeming itself advised in the premises, it is hereby

Considered, Ordered and Adjudged:

(1) That plaintiff take nothing by its complaint herein.

(2) That the defendant Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, do have and recover of and from the plaintiff his costs and disbursements herein incurred.

(3) That the defendant Albert Brown do have and recover of and from the plaintiff his costs and disbursements [48] herein incurred.

(4) That the defendant Charles M. Dake was on the 28th day of June, 1942, involved in a collision with another automobile while said Charles M. Dake was operating an International pick-up truck, as the result of which collision Emmett C. Jasper lost his life and other persons allegedly sustained injuries. That at said time and place the actual use of the said International pick-up truck was with the permission of Harold E. Wells, who is named insured in that certain policy of insurance issued by the plaintiff herein, which policy of insurance is involved in this action.

Dated this 21st day of April, 1943.

CLAUDE McCOLLOCH

Judge

Served 4/21/43.

[Endorsed]: Filed April 21, 1943. [49]

[Title of District Court and Cause.]

OBJECTIONS OF PLAINTIFF TO PROPOSED
FINDINGS OF FACT AND CONCLUSIONS
OF LAW TENDERED TO THE COURT
BY DEFENDANTS.

Plaintiff objects to the proposed Findings of Fact and Conclusions of Law tendered to the Court by the defendants, a copy of which was served upon the plaintiff herein on April 21, 1943.

I.

There is no evidence to support said tendered findings and specifically there is no evidence to support Paragraph X and XIII of said proposed findings and plaintiff excepts to any conclusions of law being made or drawn from the same.

II.

Plaintiff objects to said tendered proposed findings of fact and conclusions of law to be based thereon as they do not comply with the Federal rules of Civil Procedure and particularly Rule 52 thereof which requires facts in issue to be specifically found and the conclusions of law to be stated separately thereon.

It is impossible to tell from the general proposed finding to the effect that the use of the pick-up truck involved was with the permission of the named insured, what principal of law the Court is applying. There should be a finding whether this permission was an implied permission or an express permission and there should be a finding of

fact as to the use of the pick-up truck for which this permission obtained and there should be a finding of whether the Court is of the opinion that the use of the pick-up truck being made [50] at the time of the accident was a slight or substantial deviation from the original use for which the permission obtained or a finding of whether the Court is of the opinion that Dake had permission (express or implied) to use the pick-up truck for the purpose for which it was being used at the time of the accident.

There should be a finding of fact of whether the question of permission and consent to use the pick-up truck involved was in issue in the State Court action, and if not, what was in issue in the State Court action between the parties so that it will be possible to apply the law of whether the defendants there took a position which is inconsistent with their position in the within action and so a conclusion of law can be made thereon of whether they chose inconsistent remedies and are barred from a judgment in the within action.

It is submitted that in the absence of such findings, all of which were in issue in the within action, that conclusions of law thereon by the Court cannot be separately stated and there is no way of telling from the general findings and general conclusions of law as tendered by the defendants, what facts the court is acting upon and what principles of law apply thereto and further it leaves out entirely what construction is to be placed upon the omnibus provision of the contract of in-

surance and especially whether any meaning is to be given to the words "actual use" contained therein and is contrary to the Federal Rules of Civil Procedure.

Respectfully submitted,

JAMES ARTHUR POWERS

Attorney for Plaintiff

Due service of the foregoing objections by receipt of a duly certified copy thereof, in Multnomah County, Oregon, on the 28th day of April, 1943, hereby is accepted.

ROBERT S. MILLER

Of Attorneys for Defendants.

[Endorsed]: Filed Apr. 26, 1943. [51]

[Title of District Court and Cause.]

MOTION FOR ORDER VACATING
AND SETTING ASIDE JUDGMENT

Comes now the plaintiff and moves the Court for an order vacating and setting aside the judgment entered herein on the 21st day of April, 1943, and for an order vacating and setting aside the findings of fact and conclusions of law entered herein on the same date on the grounds and for the reason that said judgment and findings of fact and conclusions of law were entered ex parte and without any opportunity afforded the plaintiff to object thereto, and in order to afford the plaintiff to have a hearing upon its objections to said find-

ings of fact and conclusions of law passed on and determined by the Court, which said objections were filed a few days subsequent to the entry of said judgment and findings of fact and conclusions of law referred to and further to afford the plaintiff an opportunity to present another legal matter which arises out of this same transaction and have the same passed upon by the Court so that final disposition may be had of all issues which have arisen herein. The further legal matter is the result of the Court's proposed holding that Dake is entitled to protection under plaintiff's insurance policy. The plaintiff would like to introduce evidence showing that Dake's testimony on the trial of this case is contrary to written statements made prior thereto by Dake to the plaintiff and also to statements made by the owner of said pickup truck Harold E. Wells [52] and statement made by Witness Sheldon, all of which plaintiff relied upon and which are contrary to the testimony of Dake upon the trial of the cause herein and that Dake even though it be considered that he is covered by the policy in question, has violated the terms and provisions of said policy and particularly has violated the cooperation clause of said policy and by his contradictory statements in writing and by his deposition and by his testimony upon the trial of this case, has mislead the plaintiff and prejudiced the plaintiff's rights and by his acts and conduct he has deprived himself of any benefits and protection under

the said policy that he might otherwise have been entitled to.

JAMES ARTHUR POWERS

Attorney for Plaintiff,
610 American Bank Bldg.,
Portland, Oregon.

Due service of the foregoing motion by receipt of a duly certified copy thereof, in Multnomah County, Oregon, on the 24th day of May, 1943, hereby is accepted.

ROBERT S. MILLER,
Of Attorneys for Defendants.

[Endorsed]: Filed May 26, 1943. [53]

[Title of District Court and Cause.]

AFFIDAVIT OF JAMES ARTHUR POWERS

State of Oregon,
County of Multnomah—ss.

I, James Arthur Powers, being first duly sworn, depose and say that I am attorney for the plaintiff in the above entitled cause, that the first notice plaintiff received of the accident out of which the controversy herein arose was a report by Harold Wells, the assured. This report was made on regular notice of accident form and reported the matter to the plaintiff in the following language:

“Charles Dake took the truck without Wells’ consent leaving Gales Creek Sunday, June 28th on a personal trip to the coast. On his return

trip he met a car head-on causing considerable damage and one fatality. Information at present is to the effect the other car hit the Wells truck on its own side of the road."

This report was made under date of June 29, 1942. There were further statements and in more detail made by the following named persons:

Charles M. Dake;

Corvin Sheldon;

Harold Wells;

the originals being attached hereto and made a part hereof. These written statements have been in the possession of Mr. A. W. Norblad, attorney of Astoria, Oregon, who defended the action brought in the State Court at Astoria, Oregon, against Charles M. Dake and Harold E. Wells and who was employed by the plaintiff herein in that connection.

Plaintiff desires at this time to file the same herein in connection with and in support of plaintiff's motion to have the Court [54] consider at this time the further legal point of whether there has been a violation of the cooperation clause of the policy in suit to the prejudice of plaintiff.

JAMES ARTHUR POWERS

Subscribed and sworn to before me this 21st day of June, 1943.

M. I. GUSTAFSON

Notary Public for Oregon.

My commission expires: 3/11/45. [55]

I, Charles M. Dake, do say that the following is a true statement of my taking and driving the truck of Harold Wells on the week-end of the accident wherein the truck collided with the car in which Emmett Jasper and Edward Jasper were riding, on the Wolf Creek Highway:

I did not at that time have any permission whatsoever to take the truck, either directly or impliedly; that I had driven Harold Wells to his home at Oregon City on Friday night and then was told to take the truck back to Gales Creek, Oregon; that I did so; on Sunday Morning Sheldon and myself were going up into the woods and Sheldon had received permission from Wells to drive the truck up there to fix some of the equipment and I was going along to go hunting; Sunday morning Sheldon did not show up so I took the truck and went up into the woods to go hunting; Sheldon was the one who had permission to take the truck and I was just planning on riding with him to go hunting; however, I took it without permission and went up there into the woods and then when I finished hunting I came out of the woods and decided to go to Tillamook; it was a Sunday and I decided to take a "vacation trip" to Tillamook for the day; I went back to Gales Creek where I lived and left the gun and hunting equipment and then started out to Tillamook; on the road there I ran onto two women and a man who were hitch-hiking along the road and picked them up; they were strangers to me; We went to Tillamook and I have there a cousin by the name of Mike Lewis who I knew had been

looking for work so I went to his house to find him and tell him he could get work at the same logging camp where I was located; I had no permission or instructions from Wells, either implied or directly to go get Lewis or anyone else to go to work for Wells; it was my own idea and I was trying to help my cousin get work; I found out there that he had gone to Portland to work in the ship-yards; so these other three people and myself went up to the beach at Twin Rocks and [56] spent some time on the beach; we drank considerable beer along the way and eventually got up to Necanicum Junction where we entered the Wolf Creek Highway; the accident happened as we were driving along the Wolf Creek Highway going home to Gales Creek; I have never used the truck before except upon direct orders from Wells to run errands for him and this only a few times; that when I drove him to Oregon City, I was directed to take the truck back to Gales Creek and leave it there; My trip to the Coast was my own idea and without any permission or authority whatsoever.

CHARLES M. DAKE

Signed at Salem, Oregon this 19th day of July, 1942.

Witnesses:

WILLIAM W. BARTIE

WALTER NORBLAD [57]

Married & 1 child

27 years

I am Corvin Sheldon, I live at Forrest Grove, Oregon, 16 No. A St. I am employed by

Harold Wells as a Donkey Engineer and a loader. The logging operations are on round top mountain about 8 miles from Glenwood, Oregon. There is no camp at the operations nor does Mr. Wells maintain a Camp. Some of the men live at Gales Creek and some at Glenwood. These men are picked up each morning 5 days a week at the two places, Gales Creek and Glenwood and taken to the logging operations in an International pick up truck, Oregon license #89-876. They are picked up at 7 A. M. except Saturdays and Sundays when we do not log but sometimes we do repair work. I drive my car from Forrest Grove to Gales Creek where the International pick up is parked. The keys are left over week ends most of the time with the people at the telephone office when the truck is not to be used. Mr. Wells most of the time drives the truck picks up the men at Gales Creek and Glenwood and takes them to the operations. When he is not there one of the rest of us drive the truck and pick up the men and take them to the operations then the pick up stays in the woods all day. We haul about ten men in all. On Friday June 26, 1942, I told Mr. Wells I would do some work on the Donkey up in the woods he having ask me to make some repairs. I told him I would make them on Sunday June 28, 1942. Mr. Wells told me to take the pick up truck. It was when we were thru work on Friday June 26, 1942, that we had this conversation. Mr. Wells was driving the truck and Charles Dake and I were in the front seat on our way to Gales Creek. Mr. Wells said if you

want to use the pick up Charles Dake can go to Oregon City with me then drive the truck back so I could have it to use Sunday June 28, 1942. While we were on our way home Friday, Mr. Dake told me if I was going up in the woods to pick him up at Gales Creek where he was boarding and he would go with me. I do not recall what he said he wanted to do up in the woods but he was not going to work. I went to my home as usual and on Sunday June 28, 1942, In the forenoon the exact time I do not remember, I drove my car to Gales Creek to get the pick up at the usual parking place but it was not there. I had some other people with me and when I saw that the truck was not there we drove up the highway some distance and then went back to Forrest Grove. I made no inquiry from anyone as to where the truck was. I did not *kno* who had taken the truck and did not know what had happened to it until Monday noon I having rode up to the job on a logging truck Monday morning June 29, 1942. When one of the men on a logging truck told me Dake had an accident with the pick up. At no time did I ever hear Mr. Dake mention a man by the name of Mike Lewis or that he was going out looking for a man to come to work. Mr. Wells never had asked me to get any men and I have been with him the longest of all now employed. I have not talked to Dake about the details of the accident or how he came to take the truck. But I do know that he was to drive the truck from Oregon City to Gales Creek and leave it so that I could use it Sunday. I have never

known Mr. Wells to give permission to anyone to use the truck *accept* for running errands or driving to and from the logging operations. The truck is most always at Gales Creek or at the operations in the woods. Mr. Wells very seldom takes the truck home on week ends he will ride with some one else. He boards *and* Glenwood during the week.

I have read the foregoing statement on the 4 signed pages and it is true to the best of my knowledge and belief.

CORVIN SHELDON

7-18-42

HARRY G. HADFIELD

Witness: [58]

Portland, Ore

6-29-42

Statement of Harold Wells, Rt #2, Ore. City, Ore. Age 38. Employed by Self as logger.

I own and operate a 1940 Internationsl pickup in my operations which are based at Glenwood. I have had Charles Dake, employed for about 11 mos. His job is that of loader for me. On various occasions I have sent him on errands in which he used the above piece of equipment. I generally keep this rig at Gales Creek and I drive this piece of equipment myself most of the time. On Friday evening June 26, 1942, I drove this piece of equipment from Gales Creek to Oregon City, where I reside. I brought Charles down with me for the sole purpose of taking the pick-up back to Gales Creek. We arrived in Ore. City about 7:30 P. M. and Charles was instructed to take the pickup directly back to

Gales Creek where it was to be left until Monday morning, June 29, 1942. He did not say anything whatever to me about using the pickup for any reason whatever and when he went back to Gales Creek I assumed that he would follow my instructions. He has never requested the use of any of my equipment for personal reasons and I have never at any time permitted him to use this pickup for any reasons. If he had asked me for the use of the pickup for any reason I would have flatly refused to let him have it. The only reasons I use this pickup is for my own personal business reasons. It is used mostly for the purpose of picking up my crew each morning. The woods operations are approximately 15 miles from our various homes and we make the two way trip each day.

On Monday morning, June 26, 1942, at about 7:00-7:30 A. M. The truck did not show up and just afterward some of the boys showed up and said that Charles had driven the truck off about 11: A.M. on June 28, 1942. He hadn't mentioned to anyone that he was going to leave & so far as I know no one knew anything about where he had gone. The truck is always driven down for the crew by F. E. Tusing, my yarder engineer Foster Hotel, Portland, Ore.

I had to get my crew to the woods and sent word to my friend Ralph Haskins to see what he could find out. From what I learned from the boys I was fairly certain that Charles had the equipment especially since he did not show up for work. I fully intended to get my boys working and then re-

turn to report the truck stolen as I figured Charles had skipped out with it.

At about 12:15 P. M., June 29, Ralph came to the woods and reported that Charles was in the Forest Grove Hospital, having been involved in an accident somewhere on the Wilson River Road. I came immediately down to check and found that there had been a serious accident. The only information I have gotten came from Ralph who had talked to Charles in the hospital. As yet we do not even know the exact location of the accident or where the truck is. I have not given any one of my employees at any time any indication whatever that I would permit this equipment to be used for anything other than my own business purposes and directly under my instructions.

I have read the above statement of 2½ pages and it is true and correct.

HAROLD WELLS [59]

Portland, Ore.

7-17-42

Supplemental statement of Harold Wells re: Accident on June 28, 1942, near Clatsop County line involving 1940 International Truck driven by Charles Dake and owned by Harold Wells.

On June 26, 1942, Corbin Sheldon, my loading engineer, was discussing some repairs necessary to the donkey at camp. I had intended to bring my pickup home to Oregon City and keep it but when Sheldon saw fit to do some work on Sunday morning on the donkey I decided to have someone come

to Ore. City and bring the pickup back to Gales Creek so that Sheldon could come there in his own car Sunday and then go into the woods with the pickup to do the necessary work. Dake then said that he would like to go up to the woods with Sheldon and get in a little hunting. Dake had no business whatever with the truck at any time during the week end and no mention at all was made of his using the pickup at any time.

When we go to and come from the woods each day I get off at Glenwood and catch a ride into Oregon City with some of the haulers and the pickup gets me at Glenwood in the morning. I can always catch rides with the boys going up to Glenwood.

Dake has on one occasion called the hiring hall for a choker setter, this was done under my specific instructions and was done because he allegedly knew the fellow at the hiring hall and might have better luck getting someone. The extreme shortage of help makes it almost impossible to get help from the hall. Dake has never had and did not have any authority to hire anyone. All of the boys are supposed to keep their eyes open for help as *their* is an extreme shortage, not only in my camp, but every camp. Dake did not at any time mention this Mike Lewis who he claimed he went to see about work. So far as I am concerned there is no basis to this story.

Sheldon went to Gales Creek on Sunday morning to follow our plans and found the truck gone, he could not get into the woods in his car and he

then went on about his own business. He did *no* know where the pickup might be. It was when I showed up at Glenwood on Monday morning that I found Dake and the pickup gone. One of the drivers who had come down from Gales Creek told us that the truck and Dake had been gone since 11 A. M. on the day before. Dake was never permitted to take the truck from around Camp and he only used it on errands for me. The only time I have let him drive the car on the highway was when he came down with me to Oregon City for the purpose of taking the pickup back to camp for Sheldon to use. Once or twice he has been driving when he and F. E. Tusing who stay at Gales Creek picked the rest of us up at Glenwood.

The above statement of 2 pages is true and correct.

HAROLD WELLS [60]

Forest Grove, Ore.

6-30-42

Statement of Charles Dake, Gales Creek, Ore. Age 37, Employed as logger by Harold Wells. I am working as a loader at present. I have been with Harold for almost one year. On Friday night June 26, 1942, I came to Oregon City with Harold for the purpose of bringing the 1940 International pickup back to Gales Creek as I had to go back to the woods during the morning of June 27 for a while. On Saturday afternoon, June 27, I came to Hillsboro to get my teeth pulled by Dr. Brown. I then returned to Gales Creek.

At about 11:00 A.M. June 28, 1942, I left for Tillamook to see my cousin Mike Lewis who is a rigger. I wanted to see if he would come up to our camp as we were shorthanded at the time. I could not find him and at about 10:00 P.M. I reached the Wilson River Rd. at its junction with the coast hiway. I had been on the coast most of the day having made several stops. I had picked up a man and woman on the coast hiway going toward Tillamook. After reaching Tillamook they decided not to stay and asked if they could come back to Forest Grove. I consented and we were on the way back, having gotten to a point 35 to 40 miles West of Forest Grove. I was travelling east at a speed of about 35 m. p. h. and were rounding a sweeping curve to my right and travelling on my side of the road. I saw a car coming in the opposite direction and apparently going at a fast rate of speed. This car was pulling over toward my side of the road and his lights were blinding me. I pulled over as far as I could during the time I had to do so, and when I saw this car was coming toward me, I applied my brakes but before I could get stopped or even have time to slow up, I was hit headon by the other car. My left front took most of the blow. It happened so fast that I could not tell whether the other driver slowed up or tried to avoid the accident. At the impact I was knocked unconscious and was hurt, I could not do anything much but about 3/4 of an hour later I left the scene. Someone got the names of the people in the other car but I cannot find the list. I was un-

able to get any further information. There were no witnesses to the accident, but some cars came up later. I was brought into town by a sailor. I did not get his name. I have not been contacted by anyone connected with the other car and do not know anything about their injuries or who they were. The girl in my car was bruised some but the fellow was not hurt. The sister of this mans wife was in the front with me and the other two were in the back. There were three all told. They all said they were not hurt except for bruises. I had my lights on high but dimmed them when I saw the other car. His lights were on bright. I am positive that I was completely over on my side of the road and pulled over even further. At the impact my truck was knocked completely over against the south bank. The other car apparently rolled over several times. I had not had a drink at all and so far as I know none of the people in my car had anything to drink. It was clear and dry except for a very slight haze. I had not said anything to Harold about taking the truck to the coast, and have never asked for nor received permission to use the truck for personal reasons. The only reason I went to the coast was to try to get Mike to come to our camp. I have called in on several occasions to get men and Harold has always accepted the men. We were short a rigger and Harold had talked over this with me. He said to find a man if possible over the weekend, and he also expected to look around for someone. I intended to

call Mike but could not get him, so I went to where I had heard he would be.

The road at the point of the accident is blacktop and about 21 ft. wide. I am fairly sure that my right wheels ran off the pavement before the impact.

I have read the above statement of 31 $\frac{1}{4}$ pages and it is true and correct.

CHARLES DAKE

[Endorsed]: Filed June 21, 1943. [61]

[Title of District Court and Cause.]

ORDER OVERRULING PLAINTIFF'S OBJECTION TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter coming on to be heard on the objections of the plaintiff to the proposed findings of fact and conclusions of law tendered to the court by the answering defendants, and the court having heard arguments of counsel thereon, it is,

Ordered that the objections of plaintiff to the proposed findings of fact and conclusions of law heretofore entered on April 21, 1943, be and the same hereby are overruled.

Dated this 3rd day of July, 1943.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed July 3, 1943. [62]

[Title of District Court and Cause.]

ORDER DENYING MOTION OF PLAINTIFF
VACATING AND SETTING ASIDE JUDG-
MENT

This matter coming on to be heard on the motion of plaintiff for an order vacating and setting aside the judgment entered herein on the 21st day of April, 1943, and for an order vacating and setting aside the findings of fact and conclusions of law entered herein on the 21st day of April, 1943, and

The court having heard the arguments of counsel thereon, it is hereby,

Ordered that said motion is hereby denied.

Dated this 3rd day of July, 1943.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed July 3, 1943. [63]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Edward J. Jasper, Administrator of the Estate of Emmet C. Jasper, deceased, and Albert Brown, and to Charles W. Halderman, Hesse & Franciscovich of Astoria, Oregon, and McCamant, King & Wood and Robert S. Miller, of Portland, Oregon, their attorneys, and to Charles M. Dake;
Notice is hereby given that the Hartford Ac-

cident and Indemnity Company, a corporation, above named plaintiff, hereby appeals to the United States Circuit of Appeals for the Ninth Circuit from the judgment and the whole thereof, entered in this action for declaratory judgment on the 21st day of April, 1943, and which judgment is now final.

JAMES ARTHUR POWERS,
Attorney for Appellant,
610 American Bank Bldg.,
Portland, Oregon.

[Endorsed]: Filed July 19, 1943. [64]

[Title of District Court and Cause.]

CONDENSED NARRATIVE STATEMENT OF
EXHIBITS

The following Exhibits referred to were received in evidence upon the trial of this action:

Plaintiff's Exhibit 1 consists of a letter reading as follows:

“Harold Wells

Astoria, Ore

Fri

These papers were served on me this mor.
I was told to send them on to you and for you
to send them on to the insurance co.

I have been put on storage for 1 year so wont
be back on the job.

Well so long & good luck.

CHAS. DAKE”

Plaintiff's Exhibit 2 consists of National Standard Automobile Liability Policy issued by plaintiff to Harold E. Wells, insuring the said named insured against liability within limited amounts arising out of the operation of a certain 1940 International truck. The policy among other things contains these provisions:

"Item 5. The purposes for which the automobile is to be used are commercial (light), general hauling (a) The term 'pleasure and business' is defined as personal, pleasure, family and business use. (b) The term 'commercial' is defined as use principally in the business occupation of the named Insured as stated in Item 1, including occasional use for personal, pleasure, family and other business purposes.

* * *

III. Definition of 'Insured'.

The unqualified word 'Insured' wherever used in coverages A and B and in other parts of this policy; when applicable to such coverages, includes the named Insured and, except where specifically stated to the contrary, also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is with the permission of the named Insured." [67]

The policy designates the insured's occupation or business as "logging" and has an effective date

beginning January 5, 1942, to January 5, 1943, and provides for a total premium of \$29.85.

Plaintiff's Exhibit 3 consists of a reservation of rights agreement whereby the Hartford Accident and Indemnity Company undertook to defend an action on behalf of Charles M. Dake, brought in the State Court by Edward J. Jasper, Administrator of the Estate of Emmett C. Jasper, deceased, against Harold E. Wells and Charles M. Dake.

Plaintiff's Exhibit 4 consists of an affidavit relating to citizenship of parties.

Plaintiff's Exhibits 5, 6, 7 and 8 are pleadings in State Court action. All these same pleadings appear in Exhibit 9.

Plaintiff's Exhibit 9 is a judgment roll in State Court action consisting of pleadings, motion for judgment notwithstanding verdict, and judgment entered therein. By the pleadings, the plaintiff therein, one of the respondents hereto, sought to recover from Harold E. Wells and Charles M. Dake for death of deceased Emmett C. Jasper, resulting from an automobile collision. It is alleged by the complaint and admitted in the answer that Harold E. Wells was the owner of a certain pickup truck being operated by Charles M. Dake. The complaint alleges that said pickup truck was being operated negligently by both said defendants at the time of the accident. The amended answer of Harold E. Wells denied that he was operating the pickup truck at the time of the accident and affirmatively alleged that defendant Charles M. Dake, who was

admittedly driving said pickup truck, was not an agent, employee or servant of defendant Wells at the time of the accident and was not "driving this truck with" defendant Wells' "consent either express or implied but that he was operating said truck in the absence of this defendant without his consent either express or implied" to which the plaintiff filed a reply denying [68] this allegation. The Judgment Roll contains a motion made at the conclusion of the trial reading in part as follows:

"* * * the defendant, Harold E. Wells, moves the Court that the jury be instructed to return a verdict in favor of the defendant, Harold E. Wells, and against the plaintiff upon the ground and for the reason that the plaintiff had not proven his cause of action against the defendant, Harold E. Wells, and thereupon, the Court announced that in its opinion, said motion for a directed verdict was well taken and ought to be granted, but that the Court nevertheless at the request of the adverse party, upon a motion made for that purpose by Mr. F. C. Hesse, a counsel for plaintiff, would submit the case to the jury with leave to the moving party, Harold E. Wells, to move for judgment in his favor, if the verdict was otherwise would have been directed."

The judgment shows that the jury returned a verdict in favor of plaintiff in the sum of \$5000.00 against both defendants reading in part as follows:

“* * * verdict in favor of plaintiff in the amount of Five Thousand Dollars (\$5000.00) against both defendants and each of them, and with its special verdict that defendant Dake at the time of the collision was driving said pickup delivery truck as the agent, servant or employee of defendant Wells, and in pursuance of Wells’ business, and not with Wells’ permission on the personal business of defendant Charles M. Dake and their said verdicts having been duly received by the Court and filed by the clerk of the above entitled court, and attorneys for plaintiff at this time moving the Court for a judgment upon said verdicts;

“Whereupon defendant Harold E. Wells, by and through his attorneys moved the Court in accordance with the previous ruling of the Court to set aside said verdict as against him and to enter a judgment in his favor, which said motion the Court allowed, granting plaintiff an exception,

“Now, Therefore, by virtue of the law and the premises it is hereby Ordered, Considered and Adjudged, that plaintiff do have and recover of and from defendant Charles M. Dake the sum of \$5000.—and his costs and disbursements taxed herein in the sum of \$119.70, and that a writ of execution issue therefor,

“And it is hereby further Ordered, Considered and Adjudged that plaintiff recover nothing of and from defendant Harold E. Wells

♦

and that he recover his costs and disbursements incurred herein,”

Plaintiff's Exhibit 10 consists of transcript of motion for directed verdicts in State Court action which is duplicated in Exhibit 12.

Plaintiff's Exhibit 11 consists of a photograph of wrecked [69] truck.

Plaintiff's Exhibit 12 consists of entire transcript of evidence and all proceedings in State Court action.

Submitted on behalf of Appellant.

JAMES ARTHUR POWERS,
Attorney for Appellant.

Service of the foregoing by receipt of a duly certified copy thereof, in Multnomah County, Oregon, on the 11th day of September, 1943, hereby is accepted.

McCAMANT, KING & WOOD,
Attorneys for Defendants.

[Endorsed]: Filed Sept. 24, 1943. [70]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages num-

bered from 1 to 74 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered Civil 1282, in which Hartford Accident and Indemnity Company is plaintiff and appellant, and Edward J. Jasper, et al. is defendant and appellee; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designations as the same appear of record and on file at my office and in my custody.

I further certify that the cost of comparing and certifying the within transcript is \$11.30 and that the same has been paid by said appellant.

I further certify that I have enclosed under separate cover a duplicate transcript of the testimony taken in this cause, also the original exhibits in this cause, numbered 1 to 12, inclusive, pursuant to an order of this Court dated September 24, 1943.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 12th day of October, 1943.

[Seal] LOWELL MUNDORFF,

Clerk.

By F. L. BUCK,

Chief Deputy. [74]

[Title of District Court and Cause.]

Portland, Oregon
Friday, January 29, 1943
9:00 O'clock A. M.

TESTIMONY

HAROLD EDWARD WELLS

was produced as a witness in behalf of the plaintiff and, being first duly sworn, testified as follows:

The Clerk: Will you state your first name, please. [7*]

The Witness: Harold Edward Wells.

Direct Examination

By Mr. Powers:

Q. State your name for the Court, please.

A. Harold Edward Wells.

Q. What is your line of work?

A. Logger.

Q. Are you married? A. Yes.

Q. Family man? A. Yes.

Q. How many children have you?

A. Two.

Q. How old are they?

A. Nine and eleven.

Q. And where do you live?

A. At Oregon City.

*Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of Harold Edward Wells.)

Q. Mr. Wells, the Hartford Accident and Indemnity Company issued you a policy of insurance on January 5, 1942, on a certain automobile truck. Is that correct? A. Yes.

Q. Is that an International pickup truck, 1940 model? A. Yes.

Q. And for the year 1942 I believe the license number was Oregon 89-876? [S] A. Yes.

Q. You recall that on June 28th, 1942, your truck was involved in an accident? A. Yes.

Q. When did you learn of the accident? I believe that it was Sunday.

A. I learned of it about 10:30 Monday morning.

Q. And who did you learn had been driving your truck? A. Charles M. Dake.

Q. I will ask you to state to the Court whether Charles M. Dake had permission from you to drive that truck? A. No, he did not.

The Court: Is Dake in the courtroom?

Mr. Powers: Yes.

The Court: Will you point him out to me?

The Witness: Back—— (indicating.)

Mr. Miller: Back of the room.

Mr. Powers: Q. The actual use that Dake was making of the truck at that time then was without your permission?

A. Absolutely.

Mr. Powers: You may take the witness.

Cross Examination

By Mr. Miller:

Q. Where is the truck today?

(Testimony of Harold Edward Wells.)

A. My house. [9]

Q. You say you are a logger, logging operator?

A. Yes, sir.

Q. How long have you been in that business?

A. About seven, eight years.

Q. And in June of 1942 you were operating where? A. On Round Top Mountain.

Q. On Round Top Mountain?

A. Up on the Wilson River.

Q. On the Wilson River. How far is that from Tillamook? A. Pardon?

Q. How far is that from Tillamook?

A. Well, to be exact, I don't know.

Q. Approximately?

A. I think it is roughly about thirty miles.

Q. About thirty miles. How far is it from Round Top to where you were operating on Gales Creek?

A. We aren't operating on Gales Creek.

Q. No; I don't say that. From Round Top where you were operating to Gales Creek.

A. Oh. Oh, in the neighborhood of about fifteen miles, I should say.

Q. Now, have you operated at several different places on Round Top?

A. Just two; two sides of it.

Q. Just two sides? A. Uh huh. [10]

Q. Now when you were operating on the first side, we will say, when was that? When was that operation?

(Testimony of Harold Edward Wells.)

A. Well, we started in there in February of 1940, I think it was.

Q. How long did you operate there?

A. Well, we operated there until they closed Wilson River road to build on it and they shoved us off of that.

Q. Did you use the International pickup truck on that operation? A. Yes, sir.

Q. The same one that is involved in this accident? A. Yes, sir.

Q. Then where was the second operation? That likewise was on Round Top?

A. Yes. That was over on the other side.

Q. Now where did you live? At the time of the first operation where did you live?

A. I was living in an auto cabin at the logging camp there and just at the—below Gales Creek a ways.

Q. That is the time of the first operation?

A. Yes.

Q. And that was for several months.

A. Well, it was about three, four months.

Q. Who lived with you?

Mr. Powers: I am going to interpose an objection, your Honor, because I don't think that it has any relevancy or any [11] bearing on what occurred here, two years before this accident occurred.

The Court: Admitted.

Mr. Miller: Q. Charles M. Dake lived with you?

(Testimony of Harold Edward Wells.)

A. Absolutely not.

Q. At the time of the operation then on the first side you lived in the cabin and Dake didn't?

A. Yes, sir.

Q. Did you live with Dake at any time during the period next of 1941, bunkhouse or any other place?

A. Slept in the same bunkhouse with him is all.

Q. That is the time of the first operation?

A. No.

Q. When was that?

A. That is after I had been shut off the Wilson River and went over on the other side.

Q. What time of year was that?

A. Well, that was maybe along in about June, July, August; about through them months.

Q. Of 1940? A. Yes.

Q. Of 1940? A. Uh huh.

Q. Anyone else stay in that same bunkhouse?

A. Anyone else?

Q. Yes. [12]

A. Yes; there was four of us in there.

Q. Four of you in the same bunkhouse. Where was the truck kept at that time?

A. Kept there at the bunkhouse at the camp.

Q. Did you drive the truck at that time?

A. Yes.

Q. Did Dake drive the truck? A. Some.

Q. Did you go hunting with Dake at that time?

Mr. Powers: I am going to object to it again.

(Testimony of Harold Edward Wells.)

your Honor. I can state my objection specifically, and that is this: That the policy provision here is that the actual use of the truck must be with the permission of the owner, and what occurred on any other occasions can be no evidence here to either refute or support the contention of the plaintiff; and, furthermore, that particular issue, certainly as to agency, is now *res judicata*, if they were trying to make out any agency here. That issue has been fully and definitely settled in the State court action—one issue that was settled there. So I don't see that this would throw any light or give help in deciding the issue before us to go into things happening two years before. I have never gone into this; I don't know what they were.

The Court: He may answer subject to the objection. Read the question, Mr. Reporter.

Mr. Miller: I will ask another one. [13]

Q. Did you go hunting with Dake during the time you were living there at the bunkhouse?

A. No, I don't think so. Not that I remember of.

Q. Did Dake use the truck to go hunting during that time?

A. I think he did a time or two. That was all private road up there where we were.

Q. Did Dake use the truck to go out and pick up guy wires that may have been left with some other operators, chokers, things of that character?

A. A time or two I sent him with it.

(Testimony of Harold Edward Wells.)

Q. A time or two you sent him with it?

A. Yes.

Q. Did he ever use the truck without asking you during that time?

A. No; not that I know of.

Q. Now when you moved over to the other site, then where did you live?

A. Gales Creek.

Q. You lived at Gales Creek?

A. Just out of Gales Creek.

Q. With whom did you live? A. Pardon?

Q. With whom did you live?

A. With Ralph Haskins.

Q. Your operation was about fifteen miles from Gales Creek at that time? [14] A. Roughly.

Q. Roughly? A. Roughly.

Q. And did you use the truck to travel back and forth? A. Yes.

Q. Who drove the truck? A. I did.

Q. Dake ever drive it? A. No.

Q. You always drove it back and forth?

A. Yes.

Q. And during what period of time was that?

A. Well, that was about through the months of February—from February on in 1941.

Q. From February on in '41 or '42?

A. '41.

Q. And you were operating then from February, '41, and still operating there. Is that a fact?

A. Yes.

(Testimony of Harold Edward Wells.)

Q. So you have been operating there for two years? A. Yes.

Q. And did Dake work for you during all that period of time from February, '41, down to and including at least June 28th, the date of the accident, 1942?

A. Well, I am quite sure he did, unless I am mixed up on the [15] dates now. We have jumped around so much down there it is pretty hard for me to keep track of it right offhand.

Q. On February, '41, when you started over on this other site you lived with Ralph Haskins; is that correct? A. Yes.

Q. At Gales Creek? A. Yes.

Q. And where did Dake live?

A. Dake lived at Gales Creek too at that time.

Q. And with whom?

A. With Mrs. Adkins at the telephone office.

Q. Mrs. Adkins at the telephone office. Where was the truck kept at that time?

A. It was kept at Ralph Haskins' place at that time, where I was staying.

Q. Where you were staying?

A. Yes, sir.

Q. For how long a time was it kept there?

A. Well, it was kept there until we moved to Glenwood. It was kept there until we moved to Glenwood.

Q. "Kept there until we moved." Whom do you mean by "we"?

A. That is I and Haskins.

(Testimony of Harold Edward Wells.)

Q. And where is Glenwood with relation to Gales Creek and to your operation?

A. That is about six, seven miles below Gales Creek. [16]

Q. Toward the coast?

A. Yes. Towards Wilson River.

Q. Toward Wilson River and likewise toward your operation? A. Yes.

Q. Now what was done with the truck at that time?

A. It was kept at the telephone office at Gales Creek at that time.

Q. Where did you stay?

A. I stayed at Glenwood.

Q. With Haskins? A. Yes.

Q. Now how many days a week did you work?

A. We worked five days a week.

Q. And what was the practice in going to and from the camp during this period of time from February, 1942, to and including June 28th, or that work week along there, of 1942?

Mr. Powers: May I have an exception to all this line of testimony, your Honor?

The Court: It is all being admitted subject to the objection.

Mr. Powers: Thank you.

The Witness: What was the question?

Mr. Miller: Q. What was the practice going to and from work? How did you get to work?

A. In the pickup.

Q. Who drove the pickup? [17]

(Testimony of Harold Edward Wells.)

A. Well, about any of the men that happened to be available drove it from Glenwood on, after I got out, on up to Gales Creek.

Q. After you got out. Then you are speaking of coming out of the woods at night?

A. Yes; going home.

Q. Going home you would drive it from the——

A. I would drive it from camp down to Glenwood.

Q. That would be roughly how far?

A. Oh, it is——

Q. Eight miles, something like that?

A. Yes; or ten.

Q. Eight, nine, ten miles? A. Yes.

Q. Then you would get off at Glenwood?

A. Then the boys would take the pickup out on up to Gales Creek where they stayed. I furnished them transportation.

Q. What would be the practice in the morning?

A. They would come down with the pickup, pick up a man or two on the way, pick me up at Gales Creek and I drove from there on.

Q. On the week ends did you stay at Haskins'?

A. No; I come home.

Q. And by "home," you mean Oregon City, near Oregon City? A. Yes.

Q. How far is that from Gales Creek? [18]

A. I don't know exact.

Q. Roughly.

A. Well, you got about as good idea of it as I have. I have an idea it is fifty miles, forty-five.

(Testimony of Harold Edward Wells.)

Q. Forty-five, fifty miles. Did that make the additional five miles to Glenwood where you were actually staying? A. Yes.

Q. How did you generally go home to Oregon City?

A. Well, if I rode with Mr. Powell quite a bit of time, my father-in-law. He was logging with us.

Q. Mr. Powell was logging with you?

A. Yes. He is a logging operator.

Q. And he was out there during the work week?

A. Yes; he is there all the time.

Q. And he had the same practice of going home to Oregon City as you say? A. Yes.

Q. On the week end? A. Yes.

Q. That would be Friday evening of each week?

A. Quite a bit of the time, yes.

Q. Now on Friday evening, June 26, 1942, to place it in your mind, that is two days before the accident. A. Uh huh.

Q. Did you go to Oregon City with Mr. Powell? [19]

A. No; I went in my pickup.

Q. You went in the pickup? A. Yes.

Q. Did Mr. Powell go over there that week end to Oregon City?

A. He wasn't available for me to ride with. A lot of times he goes home in the middle of the week, something like that.

Q. You went in the pickup?

A. I didn't have any other way to go home so I took the pickup.

(Testimony of Harold Edward Wells.)

Q. You drove it yourself? A. Yes.

Q. Anyone with you? A. Yes.

Q. Who? A. Charles Dake.

Q. For what purpose?

A. To bring the pickup back to Gales Creek.

Q. What was he going to do with the pickup?

A. Take it back to Gales Creek and leave it there.

Q. Now when he went to Oregon City to your place did you give him anything? A. Yes.

Q. What? A. Gave him a rifle.

Q. For what purpose?

A. He was going to go hunting. [20]

Q. Go hunting for what?

A. I don't know; bear, deer, wild cats; I don't know what he was going to hunt for.

Q. When did you discuss the hunting trip?

A. Well, I guess coming out of the woods.

Q. Friday evening from work you discussed the hunting trip. And what was said and who was present?

A. Three of us was in the front seat of the pickup, Charles Dake, myself, and Corvin Sheldon.

Q. Yes?

A. Sheldon was going back up next day; he was going to do some work on the yarder horns; and Dake decided to go up with him and do a little bit of hunting. So he went home with me and brought the pickup back so it would be there for Sheldon to take up. I wanted it down there anyhow in case of

(Testimony of Harold Edward Wells.)

fire. And I loaned Dake my rifle, which he had used a whole lot before. He has used it more than I have.

Q. He used it hunting up on the other side?

A. On Round Top. I loaned it to any of the boys that worked for me that wanted it.

Q. Would Corvin Sheldon go hunting, too?

A. No, not that I know of.

Q. You say that Corvin Sheldon was to go back up and fix some horns on the yarder?

A. Yes. [21]

Q. How long had they been defective?

A. They had been giving us trouble for a day or two off and on.

Q. When were they fixed?

A. Fixed Monday morning.

Q. How long did it take to fix them?

A. Oh, I don't remember for sure.

Q. Approximately?

A. I have an idea probably a half hour or so.

Q. Probably a half hour to fix it? A. Yes.

Q. And who fixed it?

A. Well, I had a hand in it and I guess Sheldon helped with it; two or three of us.

Q. Where does Corvin Sheldon live?

A. He lives at Forest Grove.

Q. How far is Forest Grove from your operation at that time?

A. I don't know. I drove it every day, too.

Q. Well, Forest Grove is roughly seven miles from Gales Creek, is it not?

(Testimony of Harold Edward Wells.)

A. About seven miles.

Q. I think something like that. So from your operation it would be roughly twenty-two miles?

A. Yes, it would be twenty-two miles.

Q. You were going to have Corvin Sheldon go from Forest Grove back up to the yarder twenty-two miles. And how far would that [22] be in the woods off of the main highway?

A. Oh, about three miles.

Q. And he was going to drive up there and fix the horn——

A. Yes.

Q. ——on Sunday?

A. Yes.

The Court: Fix what?

Mr. Miller: Fix the horn on the yarder.

The Witness: Signal horn.

Q. And that job the next day took you thirty minutes to do?

A. Yes; with the whole crew we had while we were fixing it it was pretty expensive.

Q. What was the size of your crew?

A. I got eight men.

Q. As a matter of fact, weren't Corvin Sheldon and Dake both going to go hunting?

A. Pardon?

Q. Didn't you know that both Corvin and Dake were going to go hunting Sunday?

A. No, I didn't know.

Q. You gave Dake your rifle to go hunting?

A. Yes.

Q. You knew he was going hunting?

(Testimony of Harold Edward Wells.)

A. I had an idea he was. That is why he asked for it for.

Q. Did he get anything? [23]

A. Not that I know of.

Q. You don't know whether he got any deer?

A. No.

Q. Did you go back out to Haskins' after that?

A. Yes.

Q. When were you again at Haskins'?

A. There Monday morning.

Q. And was there deer in the basement at that time?

A. Not that I know anything of.

The Court: Is it out of season?

Q. Was it out of season at that time?

A. Yes.

Q. Did you give Dake shells?

A. No, I didn't.

Q. There were shells in the pickup truck with him?

A. Dake had some shells left from before, I guess, from Astoria. I found out afterwards I didn't.

Q. Found out afterwards what?

A. That I didn't give him any shells.

Q. That you didn't give him any? A. No.

Q. By the way, at the first camp you had a gas pump, did you not? A. Mr. Powell did.

Q. Mr. Powell had a gas pump?

A. Uh huh. [24]

Q. Who was the employer?

(Testimony of Harold Edward Wells.)

A. Mr. Powell.

Q. Who keeps the books?

A. Well, Mr. Powell keeps his books.

Q. Well, he keeps his books. Is he the employer of Dake?

A. No; Dake works for me. I am the contractor under Mr. Powell.

Q. You are the contractor to Mr. Powell. Now who does Dake work for?

A. He works for me.

Q. Who pays him? A. I do.

Q. Well now, you do not keep the books; is that it?

A. I keep books on my crew, on Dake, yes.

Q. You mean just a time book? A. Yes.

Q. Who keeps the books in connection with the gas pump that you had there at the first camp?

A. C. F. Richardson at Milwaukie.

Q. C. F. Richardson at Milwaukie?

A. Yes.

Q. And when gas was used was there a ticket issued, a ticket signed by whoever used the gas?

A. Yes, I guess there was too.

Q. Did you see those tickets?

A. Turned into the office. [25]

Q. Did you see them?

A. Well, most of them I did.

Q. Was Dake's name on several of them?

A. I don't remember of it.

Q. Did Dake have a car of his own at any time that he worked for you?

(Testimony of Harold Edward Wells.)

A. No, he didn't have a car of his own. He and a fellow pulling logs for me run around a lot together, got lots of gas out of the pump.

Q. And likewise got lots of gas for the pickup truck, didn't he? A. May have; I don't know.

Q. And used the truck himself on his own business? A. Used it whenever I told him to.

Q. Used it lots of times when you didn't expressly tell him to; isn't that correct?

A. I don't think so.

Q. When you were living there at the bunk-houses didn't Dake frequently take your truck, probably go off hunting on a day off and maybe come back with some choker chocks or——

A. He asked me for it first.

Q. And he even took it without asking?

A. Not that I know of.

Q. He used it several times, many times during the period of time you were living there at the bunk-house?

A. Yes, he drove it several times, I imagine.

[26]

Q. And do you mean to tell the Court every time he asked you, "May I use the truck?"

A. Absolutely.

Q. There were times, weren't there, that sometimes he asked you and sometimes he didn't ask you but just used it and you knew what he was doing; you knew he was either going hunting or you knew he was going out and probably get some guy wire or——

(Testimony of Harold Edward Wells.)

A. I never give anybody working for me permission to use that pickup without my permission; nobody.

Q. You mean to use that truck; nobody used it without express permission from you?

A. Not that I know of. He was in a position lots of times where he could have used it if he wanted to get into it, but he didn't use it that I know of without my permission.

Q. Well now, you did know that Dake was going hunting on Sunday, June 28th? A. Yes.

Q. And you knew how he was going to go hunting?

A. He was going to ride up with Corvin Sheldon in the woods.

Q. Dake took the truck back to Gales Creek?

A. Yes.

Q. Which is seven miles beyond Forest Grove?

A. Yes.

Q. And Dake had the keys to it?

A. Yes; had to have to drive it. [27]

Q. Yes. Did Dake pick anything else up at your place in Oregon City Friday night, June 26, 1942?

A. It seems to me like I threw an empty gas drum in the back end.

Q. Who did you tell to take those up to the woods?

A. I didn't tell anybody to take them up there but to take them up Monday when we went up, or when Sheldon went up to dump them out.

(Testimony of Harold Edward Wells.)

Q. You say you don't know whether Dake got any deer or not? A. No; no.

Q. You say there would be no deer in the Haskins' place on Monday morning when you got there?

A. Not that I know of.

Q. Did you look?

A. No, I didn't. I went in and changed clothes and went out to go to work.

Q. Did you inquire at any time? A. No.

Q. Didn't your father-in-law, Mr. Powell, tell you that there was deer in the basement of Haskins' place? A. No, he didn't.

Mr. Powers: Now, if the Court please, he has already answered——

The Court: I didn't hear the answer. Go ahead, Mr. Powers.

Mr. Powers: I don't see how any question about deer would enter into this, what somebody told him about a deer in [28] Haskins' basement.

The Court: He may answer subject to the objection.

Mr. Powers: I think he has answered, your Honor.

The Court: I didn't hear it so he will have to answer again. What was the answer of the witness?

A. No, he didn't.

By Mr. Miller:

Q. You were shorthanded in the woods at the time, were you not? A. Uh huh.

Q. Pardon me? A. I was one man.

(Testimony of Harold Edward Wells.)

Q. What kind of man? A. High climber.

Q. Was that gentleman discussed with your crew?

A. Well, they all knew that I wanted a high climber, would hire one if he had come along. I was doing the work myself. I still do it.

Q. Did you ever give any orders that your men could not use the truck? A. Yes.

Q. When?

A. A good many times. I never allowed anybody to use the truck for their pleasure because I had to have it for my work.

Q. The question was, Did you ever give any orders to that effect? [29] A. Yes.

Q. When? A. Lots of times.

Q. Well, can you give us one occasion?

A. No, I can't tell you the date that I did.

Q. Well, any occasion. Can you remember the occasion when you gave the order?

A. Ever since like I have had my men ask me to use it to move with, something like that, I turned them down; I told them I had to have it for my work; if I didn't have it I couldn't work.

Q. You mean since you have been logging, even at your operation at Round Top since 1940, you mean you haven't let your men use that truck to haul furniture?

A. No; not only Haskins, the fellow I lived with; he was moving my furniture as well as his.

Q. You let him use it to haul wood?

A. Yes.

(Testimony of Harold Edward Wells.)

Q. You have let him——

A. That was my wood, too, as well as Haskins' wood.

Q. Let anyone else use it to haul wood?

A. No.

Q. Did Corvin Sheldon use it last week to haul wood for himself?

A. I think he did haul some wood a couple blocks.

Q. Did he ask you for it?

A. Yes. And he had the pickup in his yard at the time. [30]

Q. Well, it is parked now at Corwin Sheldon's yard?

A. It was in his place at the time. Sometimes it is at his house.

Q. Ever let Dake use it to haul any furniture of his?

A. I don't think so.

Q. Don't you recall you let Dake use it to haul furniture from Portland to Forest Grove?

A. I believe I did; I believe I did.

Q. And it was driven in general use, was it not?

Mr. Powers: I will object to that.

The Witness: General?

Mr. Powers: He has been very specific; now, general use. The witness has testified that he never let anybody use it for their private business or their own pleasure, and when Mr. Miller says "general use" he might mean general use around the logging operations or general use by all the employees any

(Testimony of Harold Edward Wells.)

time they wanted to use it. We will object to it on that ground.

The Court: He may answer subject to the objection. What was the answer?

A. No, not generally.

Q. Around the woods it was used by anyone that happened to be handy?

A. Anything I wanted I sent any of the boys that could drive it after it up in the woods.

Q. Any one of the crew? [31] A. Yes.

Q. When you came down out of the woods at night anyone that happened to be in the front seat would drive it from Glenwood on to Gales Creek; is that correct? A. Yes.

Q. The same would be true in the morning?

A. Yes.

Q. Anyone who happened to be in the front seat would drive it?

A. The yarder engineer drove it quite a bit of the time. Dake drove it part of the time.

Q. Mr. Richardson you say keeps the books?

A. Yes.

Q. That is all the books of the Powell operations? A. Yes.

Q. He would have everything that shows Dake's employment?

A. I have got the papers here of his time showing that he never did work for me on Saturday and Sunday.

Q. Do you have the records concerning the gas consumption? A. No, I haven't.

(Testimony of Harold Edward Wells.)

Q. Would it be convenient to have Mr. Richardson bring those here? A. Today?

Q. Yes.

A. Well, I don't have an idea he can get them ready and bring them that quick. He is pretty busy. [32]

Q. He lives where?

A. Lives at Milwaukie.

Q. Will you be good enough to call him and ask him if he can do that?

A. I guess I can. I don't know whether he can or not, but I will try and call him and ask him.

Q. He has all those records that relate to Dake's employment and all the records relating to the operation of the truck, gas consumption?

A. There is no records of the truck; I don't keep any records of it. I put my own gas in it. Might be a record of gas I got at the pump on the other side because that was Mr. Powell's. Ordinarily I buy my own gas and put my own gas in it. I don't keep records of it. I put gas in it whenever it needs it.

Q. There was a record of gas consumed on the other side and by whom it was consumed?

A. Yes. I don't know whether it was.

Q. He has slips on them?

A. Yes, I imagine he has got those slips. I have got a record of Dake's time here if you want it now.

Mr. Miller: I will be glad to have you produce it.

(Testimony of Harold Edward Wells.)

The Court: We will have a short recess, gentlemen.

(Recess.)

The Court: Continue the examination, gentlemen.

Mr. Miller: Q. Mr. Wells, you handed me two sheets of paper [33] upon which there are some figures, and will you tell me who prepared these?

A. Judge Richardson.

Q. He is the one that keeps the books?

A. Yes.

Q. It would appear from just looking at it that that doesn't cover the entire period of time that Mr. Dake worked for you; is that correct?

A. Yes, that does.

Q. It does cover the entire period of time?

A. Yes; I am quite sure.

Q. Well, I understand you to say he worked for you in 1940?

A. Well, I might have been wrong on the dates that he went to work for me. What dates does it show there?

Q. Well, as I view it, it just shows from 10/31/41.

A. On the back side, too?

Q. Well, it apparently goes back as far as July of '41.

A. Well, that must be when he went to work for me then.

Q. It may have been then?

A. It must be.

(Testimony of Harold Edward Wells.)

Q. Mr. Richardson again is the one that keeps the books, however? A. Yes.

Q. How long has he been working for you this last time? A. Oh, about a month.

Q. Mr. Dake was confined to the State Penitentiary for some time; [34] that is correct?

A. Yes.

A. Recently? A. Yes.

Q. And immediately after his release he went to work for you; is that correct? A. Yes.

Q. Doing the same job? A. Yes.

Q. And what is that job? A. Loading.

Q. Head loader, is he? A. Yes.

The Court: Is he out on parole?

A. Yes.

Mr. Miller: Q. Now you have been shut down this week, have you not?

A. Yes.

Q. This past week? A. Yes.

Q. Because of the snow? A. Yes.

Mr. Miller: I think that is all. [35]

Redirect Examination

By Mr. Powers:

Q. Well, Mr. Powers, you stated that Dake had used this truck on other occasions. State to the Court, if you will, whether you ever gave Dake permission to use this truck out on any public road such as where this accident occurred.

A. Since he called my attention to it I think I did let Dake use the truck one time when he first

(Testimony of Harold Edward Wells.)

—shortly after he went to work for me to move some furniture.

Q. That would be how long before this accident?

A. Oh, that was probably pretty close to a year.

Q. About a year before. Other than that did you ever give him any permission to use the truck out on any public road?

A. No. Do you know for sure that I let him use the truck to haul some furniture?

Mr. Miller: I don't know.

The Witness: Well, I don't neither. I am not going to say that until I find out for sure. I may have.

Mr. Powers: Q. Well, what is your recollection about that? Do you know whether you did or not?

A. No, I don't remember of letting him have it. It seemed to me like that he asked me for it. I have some recollection of it but I don't remember.

Q. Well now, you were asked by Mr. Miller whether other employees around there asked you to use that truck and to take it on their [36] own personal business. What is the fact about that? Did you have any rule about that?

A. Well, yes; a rule I don't let them have it.

Q. And what kind of request would they make to use that truck?

A. Well, all kinds.

Q. What?

A. All different requests; some of them for one thing and some another.

(Testimony of Harold Edward Wells.)

Q. To haul furniture and things like that?

A. They don't ask me for it very much as a rule because they know I don't want to loan it.

Q. Is it known around there that you wouldn't let anyone take it? A. Yes.

Q. You said that you did let Corvin Sheldon use it last week to haul some wood?

A. I think he did—he had some wood, yes. I was in town, Forest Grove.

Q. Did he ask you whether he could use it?

A. Yes.

Q. You let him use it for that?

A. Yes. I don't know whether he hauled wood.

Q. He asked you? A. Yes.

Q. Then you said you let—Haskins, is it?

A. Yes. [37]

Q. Use it. When was that that he used it?

A. He had moved our stuff from one house to another there in Forest Grove. Then he hauled some of our wood up from Gales Creek up to Forest Grove.

Q. When was that?

A. When the wood was hauled up? It has been about two or three weeks. The wood was my wood. I hauled wood. Like I say, the truck was mine. I sawed and split it myself. It was my wood.

Q. In other words, you let Sheldon use it a week or so ago, according to your testimony, a long time after this accident of Duke's? A. Yes.

Q. Now you referred to private roads and to

(Testimony of Harold Edward Wells.)

public roads when Mr. Miller was talking to you. What is the difference there?

A. Well, up in the woods on a private road. I do a lot of work with it, running back and forth from one side to the other getting this and that and the other. I never hesitate to send anybody to take it because it is up there on Round Top.

Q. Now I will ask you whether you ever let anyone use this truck to go on a pleasure trip; to take it and just go out riding, go to the beach or anything like that?

A. Absolutely not.

Q. You were asked about sending the truck back to Gales Creek after you went to Jennings Lodge on Friday. Why did you want the truck at Gales Creek? [38]

A. Wanted it back down there so in case of fire the boys would have it there; if we get fire in the woods, which we did about a week or so afterwards.

Q. What about the work to be done by Sheldon up in the woods over the week end?

A. I wanted it back so Sheldon could use it. You can't get up in the woods without a car.

Q. Did Dake know that Sheldon was going to use that truck to go up in the woods?

A. Yes.

Q. When was Sheldon to take the truck up in the woods?

A. Saturday morning.

Q. Was it Saturday or Sunday?

A. Saturday or Sunday, I don't remember now which it was. I believe it was—it might have been

(Testimony of Harold Edward Wells.)

Sunday morning. I think if I remember right Sheldon wanted to do something Saturday and he said he would go up Sunday and do it.

Q. You said it took a half hour to repair the yarder up there. How many men had to work on it to repair it?

A. Just two or three boys worked on it but the rest were standing around. You can't do anything when it isn't working.

Q. Well, what is the whistle on the yarder?

A. It is a signal horn for the rigging crew out in the woods. They can't do anything if it isn't working.

Q. Does it work with electricity or steam? [39]

A. Electricity.

Q. How long are the lines that you have to work over in repairing it?

A. I got a thousand feet of cord. I have an idea there is about six, seven joints in the cord. They get out of kilter; the horn got out of kilter.

Q. What was wrong at that time, do you know?

A. I don't know whether—it is pretty hard to trace it. It might have been in the horn or a joint just apart.

Q. What function does the whistle on the yarder perform? Can you work without it?

A. No.

The Court: I understand that. Don't give any more time to that.

Mr. Powers: Yes, your Honor.

(Testimony of Harold Edward Wells.)

Q. Well, I will just ask you this: What was Sheldon's job in the crew?

A. At the time he was working for me?

Q. Was he the engineer?

A. Yes; also the engineer and kind of handy-man on mechanical work.

Q. Was there at that time any restrictions as far as priority is concerned for the use of the truck on the job? A. Tires was rationed.

Q. State to the Court—— [40]

The Court: That is a pretty good point. Mr. Powers. A man would have a hard time getting permission from me to use my car nowadays with the tire mileage I have left. I am saying that seriously, too.

Mr. Powers: Yes.

The Court: That is a good point in this case.

Mr. Powers: Q. As I understand it, this pick-up truck, you just stated, was the only way that you could get up around in the woods: that you couldn't drive an ordinary car up?

A. No. I have got 40-inch wheels on it; the same size as a logging truck.

Q. You have got what?

A. I have got 40-inch wheels on it; the same size as a logging truck.

Q. And this accident occurred on Sunday, on June 28th. You brought the payroll records in under subpoena, I think, from the defendants, did you not? A. Yes.

(Testimony of Harold Edward Wells.)

Q. Did Dake get paid anything after Friday, the day that you shut down?

A. No. His pay stopped Friday when we quit work up in the woods.

Q. Yes. Now you carried State Accident Insurance, did you not? A. Yes.

Q. And was there any report made to the State Accident Commission that Dake had been injured on the job? [41]

A. No. He wasn't on the job.

Q. So he got no compensation at all for the time he was laid off after that accident?

A. No.

Q. Well, how well established was this rule around the camp about no one using that truck without your permission?

A. Well, it was quite well known.

Q. Was it known by all those people?

A. Yes.

Q. Was it known by Dake? A. Yes.

Q. And the times that you had let him use it before were in connection with up around the camp? A. Most of the time.

Q. You had sent him to do some errand for you there? A. Yes.

Q. And because of—what did you say about wanting it there in case of fire? Was that the fire season? A. Yes.

Q. Was it necessary to have it right at Gales Creek for that reason?

(Testimony of Harold Edward Wells.)

A. Pretty near always some of my men stayed there over the week end and if they got fire up in the woods they could be up there way before I could get down there; and we did have a pretty bad fire last summer shortly after this accident.

[42]

Q. How long after this accident?

A. I think the fire broke out the day of the Fourth of July.

Q. Well, to summarize, then, was this truck used for anything but business purposes, with your permission? I mean, would you let anyone use it for anything other than business? A. No.

Q. What kind of work does Mr. Dake do for you now? A. Head loader.

Q. Is that important work around logging?

A. Yes. It is hard to get a man. I never did replace him the whole time he was gone.

Q. Do you work getting out logs now if the weather permits? A. Yes.

Q. Getting out logs? A. Yes.

Mr. Powers: I believe that is all.

Recross Examination

By Mr. Miller:

Q. Those business purposes that you spoke of, was it necessary to get your permission to drive the truck? A. Yes.

Q. You sent it back out there so it would be there Sunday in the event of fire or something?

A. Yes.

Q. You wanted it there for emergency purposes?

(Testimony of Harold Edward Wells.)

A. So Sheldon can use it too. [43]

Q. If there was fire would somebody have to call you up?

A. No. If there was fire they would take it and go on up there.

Q. Now on this ration order, what kind of card do you have on that truck? "C" card?

A. No; it is a "T" card.

Q. "T" Card?

A. They wasn't in effect then.

Q. It wasn't in effect then. You had an unlimited supply of gas? A. Not at that time.

Q. What about your tires?

A. Tires were rationed.

Q. They were rationed. But do you get tires for your truck? A. Yes.

Q. Have you got them?

A. Yes, I can get tires for them, and have got them.

Q. Logging has priority; is that correct?

A. Yes.

Q. Get them at any time? A. Yes.

Q. These pay roll records you speak of, you say they were produced at my request, you were subpoenaed to bring those?

A. Yes. That is the records Mr. Richardson fixed up for me at the trial in Astoria. I kept them and I was requested to bring them down there. [44]

Q. Oh, I see; the trial at Astoria. You say you have no truck records of any sort? A. No.

(Testimony of Harold Edward Wells.)

Q. Did Richardson keep any?

A. No, I don't think any outside of some expenses maybe for repair work like that, charged it up to my logging work.

Q. Your summarization of this whole thing is Dake stole the truck, is that right, on this Sunday? A. Took it without my permission.

Mr. Miller: That is all, your Honor.

Mr. Powers: That is all, Mr. Wells.

The Court: Step down.

(Witness excused.) [45]

CHARLES M. DAKE

was called as a witness in behalf of the defendants, and, having been duly sworn, was examined and testified as follows:

The Clerk: Will you state your full name, please.

The Witness: Charles M. Dake.

Direct Examination

By Mr. Miller:

Q. Your name is Charles M. Dake?

A. Yes, sir.

Q. Mr. Dake, are you working now?

A. Yes, sir.

Q. And where are you working?

A. I am working at the shipyards right at the present time.

(Testimony of Charles M. Dake.)

Q. And what shipyards?

A. At—wait a minute; Commercial.

Q. And what shift are you working? [48]

The Court: I don't know if you like it; lots of people don't but if your throat chokes up on you (handing cough drop to witness)——

Mr. Miller: Thank you, your Honor.

Q. Work the graveyard shift, you have been working all night?

A. That is right; got off out there at 8 o'clock this morning.

Q. Got off at 8 o'clock this morning and came right here to the courthouse; is that correct?

A. Yes, sir.

Q. How long have you been working there?

A. Went to work Sunday night.

Q. Sunday night? A. Yes.

Q. As soon as the camp shut down, is that correct, or soon after that?

A. No; I went to work just a few days after the camp shut down.

Q. Now, Mr. Dake, you have worked for Harold E. Wells? A. Yes.

Q. How long a time did you work for Wells?

A. I worked—I went to work for him——

The Court: Are you going back to work for him after—when the camp opens?

A. I am just working down there temporary now.

(Testimony of Charles M. Dake.)

The Court: You expect to go back to work for Wells? A. Yes. I am supposed to be frozen.

[49]

The Court: Yes, I see. Well, this is a kind of personal question but I know you won't mind it: Are you paroled to him?

A. Yes.

The Court: Is one of the conditions that you work for him?

A. No.

The Court: How long is the period of your parole?

A. Seven months.

Mr. Miller: Q. The questions is how long have you worked for Wells? Approximately two years, is that correct?

A. Yes. I went to work, I think it was the 21st of June—or July, rather, in '41.

Q. In '41? A. I think it was; '41.

Q. And your job is that of head loader?

A. Head loader.

Q. And that is the same job you have had at all times? A. Yes.

Q. Of course, for a period of time from June 28th until just recently you were not employed by him? A. No.

The Court: What is your age?

A. Thirty-eight.

The Court: Have you ever been married?

A. Yes.

(Testimony of Charles M. Dake.)

The Court: Oh, yes, there was some reference to that. [50]

Mr. Miller: Q. You divorced now; you have children?

A. I have a daughter and granddaughter.

Q. How old is your daughter?

A. Twenty.

Q. A granddaughter, you say? A. Yes.

Q. Now when you first went to work for Wells that was on Round Top? A. Yes.

Q. In fact, the entire operation has been on Round Top, or just on two sides of Round Top; is that correct?

A. Yes, you might say it was two sides. When I first went to work for him he had a camp on top of Round Top.

Q. Now Mr. Wells has testified. You heard him this morning? A. Yes.

Q. And he testified that for a period of two or three months or so that you and one or two others lived in a bunkhouse right somewhere up near the first operation, first site? A. Yes.

Q. That is the fact, is it? A. Yes.

Q. And Mr. Wells likewise testified that the same truck, International pickup truck, was there and was used. A. Yes.

Q. Now will you tell us if you used that truck at that time? [51]

A. I used it to go hunting.

Q. Used it to go hunting? A. Yes.

Q. Did you go hunting many times?

(Testimony of Charles M. Dake.)

A. Go several week ends up there.

Q. Several week ends? A. Yes.

Q. Did you ask Mr. Wells if you might use the truck?

A. Sometimes. Sometimes I didn't.

Q. Sometimes you did and sometimes you didn't. Was he there generally when you used it?

A. No; sometimes he was, sometimes he wasn't.

Q. Your answer was, Sometimes he was and sometimes he wasn't; is that correct?

A. I said, Sometimes he wasn't there; he was gone home over the week end. Sometimes I used it when he was in camp during the week end.

Q. Now did you—I believe you said you used it on some occasions without asking him?

A. Yes.

Q. Was he there on some of those occasions?

A. Well now, I don't know for sure about that part of it, but I know if I had wanted to use it I went out and used it, because I didn't think anything wrong about it, working there.

Q. If you wanted to use it you just went and used it. [52] A. Yes.

Q. And you would use it for what purpose?

A. About all I did was to go hunting. Of course, if I happened to see something could be used I always picked it up.

Q. And by that you mean what, guy wires or chokers, things of that character? A. Yes.

Q. And around that country there had been other operations that had——

(Testimony of Charles M. Dake.)

A. Oh, lots of them.

Q. Wait a minute.

A. Quite a few had been.

Q. —burned over and cut over lands?

A. Yes.

Q. And there were operations that no longer operated; is that correct? A. Yes.

Q. How often would you say you used that truck during that period of time?

A. Oh, it is hard to say. I wasn't in camp every week end myself. During hunting season I used it quite often.

Q. Well, by "quite often," would you say you used it as many as a dozen times, would you say?

A. No, I wouldn't say a dozen times during hunting season, but I might have used it a dozen times altogether the time I [53] lived there.

Q. Sometimes you asked and sometimes you didn't ask? A. Yes.

Q. Now, when you went hunting whose gun did you use? A. I used Mr. Wells'.

Q. In this use of the truck and gun on Round Top there in the first operation when you would go hunting, do you recall of sometimes telling Mr. Wells that you were going to go hunting?

Mr. Powers: Now that is all leading, your Honor. It is his witness and he ought to ask him facts.

The Court: Go ahead; ask the question again.

Mr. Miller: Q. Will you tell us in your own words about the use of the truck on Round Top

(Testimony of Charles M. Dake.)

when you were speaking of going hunting or the use on other occasions. Now we are talking about the first site, the first operation when you were living at the bunkhouse.

A. Well, if I happened to be in camp over the week end and I wanted to go hunting I always took the pickup; if it hadn't been there and Mr. Powell's pickup happened to be in camp I would use it; I wouldn't figure there was anything wrong about it.

Mr. Powers: Now we move that answer be stricken, as to whether there was anything wrong about it. I think we ought to get the facts as to whether he asked permission to take the truck when Wells was there; of course, Mr. Powell's truck isn't involved here at all, as I understand it; and the number [54] of times, if it is material here at all, he used that truck in the year before when they were working on the other side, whether he ever took it when Mr. Wells was there without asking Wells' permission.

The Court: It may remain subject to the objection.

Mr. Miller: Q. Did you buy gas for the truck?

A. I have put gas in it.

Q. You put gas in it? A. Yes.

Q. On more than one occasion?

A. Oh, a time or two.

Q. And when you put gas in it where did you get the gas?

(Testimony of Charles M. Dake.)

A. I bought it there from the gas pump.

Q. You bought it from the gas pump?

A. Yes.

Q. And that is on Round Top? A. Yes.

Q. And in what manner would you buy it; how did you finance payment for it?

A. Whoever had the keys to the pump would tell them I would like to have five gallons of gas and they pumped it in and charged me for it.

Q. Charged you for it? A. Yes.

Q. And then how was it paid?

A. Come off the pay roll. [55]

Q. Would be deducted from your check at the end of the month? A. Yes.

Q. How often were you paid, every two weeks or what?

A. It come out on the next payday. Paid every two weeks.

Q. On the next payday it would be deducted. Would there be an itemization showing that?

A. Showed commissary; we had a commissary there, bought tobacco there; showed cigarettes, tobacco, candy, gasoline, whatever you bought, the same as any other commissary in camp.

Q. You bought gas for the truck and put it in the truck? A. I have.

Q. And then what use was made of the truck on those occasions?

A. Well, one time especially I went hunting up on—we didn't get anything and we come back and were kind of low in spirits and I drove it down to

(Testimony of Charles M. Dake.)

Timber and got half a case of beer, and I don't think Mr. Wells knew anything about that.

Q. You bought gas for it and signed the ticket for it?

A. I bought gas and charged for it.

Q. Did you have any other car there at that time?

A. A friend of mine had a car there.

Q. Yes. You have on occasion bought gas for that car?

A. I have for it, too.

Q. Can you remember who in particular was present when you bought that gas and had it pumped into the truck?

A. Why, I don't know. I think as a general rule it was the [56] fire warden had the keys over the week end.

Q. The fire warden?

A. He would make out a ticket and turn it in to the bookkeeper.

Q. Who was that?

A. Who?

Q. The fire warden.

A. I don't remember what his name is. He is in the room now but I don't remember what his name is.

Q. Now after you moved to the other side Mr. Wells testified you lived at the telephone office, or Mrs. Adkins' place at Gales Creek, and that that was roughly fifteen miles from the logging operation, and for a short period of time he lived with Mr. Haskins at Gales Creek and then a short while later he moved, Mr. Haskins moved and Mr. Wells

(Testimony of Charles M. Dake.)

likewise moved, down near Glenwood, which is about ten miles from the operation. Now, Mr. Wells likewise testified the manner in which he went to and from work; that from Adkins place up to the logging operation about fifteen miles in the morning that whoever happened to be at Adkins would drive the truck down to Glenwood and there pick up Mr. Wells and then perhaps he was the one that drove from there on up to the woods, and the same was true at night going out, Mr. Wells would drive the truck down to Glenwood and get off and whoever happened to be in the seat would drive on down to Adkins place; is that a correct statement?

A. Yes. [57]

Q. Now, the truck, then, at least in June of 1942, was left at Adkins; is that right?

A. Well, a good measure of the time. Sometimes it wasn't.

Q. A good share of the time it was left there?

A. After moved to Glenwood.

Q. How long a time had it been left there; how many months, approximately?

A. I don't remember what time Haskins moved up to Glenwood. Might have been a couple months anyway.

Q. Couple months anyway. That would be May and June, anyhow, of 1942?

A. Well, yes; anyway that long.

Q. Now did you drive the truck during that period of time?

A. Well, I went fishing a couple of times; I never

(Testimony of Charles M. Dake.)

asked Mr. Wells. I took it fishing after supper; drove it up the road about a mile to fish. I didn't ask him anything about it.

Q. Now on Friday, June 26th of 1942 did you discuss with Corvin Sheldon and Mr. Wells the possibility of going hunting that week end?

A. Yes.

Q. And if you will just tell his Honor what was discussed and tell him what occurred at that time.

A. Well,—

Mr. Powers: We will ask an exception to this, your Honor; it wouldn't be binding on us, we weren't there, purely conversa- [58] tion and all hearsay, not proper competent evidence; it doesn't tend to prove or disprove the issue here, whether the actual use of the truck at the time of this accident was with the permission of Wells.

Mr. Miller: Q. Was Mr. Wells there?

A. Yes.

Q. And there was a discussion there between—

Mr. Powers: You said Mr. Wells was there?

Mr. Miller: Corvin Sheldon, Harold Wells and yourself.

Mr. Powers: Make the same objection.

The Court: Admitted subject to the objection.

Mr. Powers: Thank you.

Mr. Miller: Q. You just tell his Honor what was discussed about hunting, what was said between Corvin, Mr. Wells and yourself.

A. Well, we got talking, been talking about hunting, and I wanted to know if he wanted to go

(Testimony of Charles M. Dake.)

hunting over the week end; he said, Yes. I didn't have no gun; so I said I would borrow Mr. Wells' gun, ask him for it; he said he didn't have it up there, he said it was home. So he said if I would take him home I could bring the pickup back and bring the gun back, bring the pickup back to Gales Creek, which I did.

Q. Who suggested you go hunting?

A. Well, we had been talking about it quite a while, you see, every morning we went to work. [59]

Q. Did Corvin decide? Did Corvin Sheldon decide to go hunting, too?

A. That is what I understood him to tell me.

The Court: What were you going to hunt?

A. Going deer hunting.

The Court: Deer hunting.

Mr. Miller: Q. Now when you drove—you understood that Corvin Sheldon was going deer hunting too, is that correct?

A. I understood him that way.

Q. And when you drove down out of the woods that night did you stop at Glenwood where Mr. Wells was staying? A. Yes.

Q. And did he get off there? A. Yes.

Q. Then what arrangement was made to again pick him up?

A. Well, he was going to change clothes and eat supper and I was going to change clothes and eat supper before we left. So I went on down and ate my supper and changed my clothes and drove the

(Testimony of Charles M. Dake.)

pickup back to Glenwood and got Mr. Wells and he drove it on to Oregon City.

Q. Now was it discussed between you and Corvin Sheldon when you were going down out of the woods and in the presence of Mr. Wells when you and Corvin Sheldon should meet to go hunting?

Mr. Powers: It is all leading, when you should meet to go hunting. [60]

Mr. Miller: If.

The Court: He may answer.

A. I understood we was going to meet in the early Sunday morning.

Q. You understood from the discussion, is that it, he was to meet you early Sunday morning?

A. That was what plans Corvin and I had made.

Q. Did you drive Mr. Wells then to his home?

A. He drove it from Glenwood to Oregon City.

Q. That was on Friday evening——

A. Yes.

Q. ——the 26th of June, 1942. Did you get his gun? A. Yes.

Q. Gave you his gun? A. Yes.

Q. To go hunting? A. Yes.

Q. And did he know in what manner you were going to go hunting, how you were going to get to wherever you were going hunting?

Mr. Powers: I think he should tell what occurred, if it is competent at all, about what was said and let the Court draw some conclusion rather than

(Testimony of Charles M. Dake.)

the witness from any actual conversation that may have been had. We would like to save an exception to this entire line of testimony on the grounds heretofore stated and on the further ground that it is just a repetition of everything that has occurred in the state court [61] proceedings; that has all been gone over.

The Court: Continue.

Mr. Miller: Q. Was it discussed between Mr. Wells and yourself how you were going to go hunting?

A. I was going to go up in the pickup.

Q. Was that discussed?

A. We talked; that is the reason we thought of—I thought that was the reason he was bringing it back, for one purpose.

Q. Now at Jennings Lodge, Oregon City, or wherever Mr. Wells lived, he gave you the gun. Did you get anything else there?

A. Well, I picked up a couple gasoline drums, empty ones.

Q. Now there has been some testimony about a horn on the yarder that wasn't working. Was that discussed between Corvin Sheldon and Mr. Wells and yourself?

A. Well, we talked about it and said we would fix that horn when we went up there hunting.

Q. You would fix the horn when you went up there hunting?

A. Yes.

Q. Now on Sunday morning did Corvin Sheldon show up to go hunting?

A. I didn't see him.

(Testimony of Charles M. Dake.)

Q. What did you do Sunday morning; just tell the Court what you did.

A. Well, I got up—I was supposed to go early and I got up and waited there and he didn't show up and I took the gun and [62] pickup and went on up in the woods.

Q. In the pickup? A. Yes.

Q. Did you go hunting? A. Yes.

Q. Where did you hunt?

A. Hunted up on Round Top.

Q. You say you hunted up on Round Top?

A. Yes.

Q. How far did you have to drive——

A. Oh, I think——

Q. ——from Gales Creek?

A. It is about fifteen miles or so from Gales Creek up to the donkey. I drove up there first.

Q. And about twelve miles of that is on the main highway, isn't it?

A. Yes; right around that. I drove up—went up to the donkey setting first.

Q. You went up to the donkey setting first. Did you hunt there? A. Yes.

Q. Did you get anything? A. No.

Q. Did you hunt anywhere else?

A. I hunted over on another road.

Q. Did you get anything there? [63]

Mr. Powers: We will object to that, that it doesn't tend to prove or disprove anything in this case, where a man goes hunting and whether he got anything. It certainly doesn't go to the question of

(Testimony of Charles M. Dake.)

the actual use of this car at the time this accident occurred that night with the other people in the car and after the man had been down to the coast.

The Court: He may continue subject to the objection.

Mr. Miller: Would you read the question, please.

(Last question read.)

Mr. Miller: Q. That is at the second place.

A. The second? No.

Q. You drove around several places looking for deer; is that correct? A. Yes.

Q. Did you finally get some deer?

Mr. Powers: Now we will object to that, your Honor; just trying to embarrass the witness, I assume.

Mr. Miller: I am not trying to embarrass the witness at all. I am trying to bring out the whole story for his Honor.

The Court: Did you get a deer? A. Yes.

The Court: How many did you get?

A. I killed a couple.

Mr. Miller: Q. Pardon?

A. I think I killed a couple. [64]

Q. And then what did you do after you killed those two? A. I come out of the woods.

Q. And where did you take the deer?

A. Well, I took them down and left them.

Q. Where?

A. Well, I don't like to say where I left them.

Q. Where did you leave—if you will answer this

(Testimony of Charles M. Dake.)

question: Did you leave one of them with Mr. Haskins? A. I don't like to answer.

The Court: He doesn't have to answer.

Mr. Miller: Q. Did you make a phone call to Mr. Powell on that day, that Sunday?

A. Let's see, I don't know; I think I did; I don't know for sure.

Q. And what was the nature of the phone call?

Mr. Powers: Well, he says he doesn't know for sure whether he made a call or not.

Mr. Miller: Q. I thought you said you thought you did.

A. I said I didn't know for sure whether that was——

Q. Was it your best recollection you did make a call?

A. Well, I could have; I might have that day.

Q. What is your best recollection?

A. Well, now, I wouldn't just exactly say just for sure on that on that day.

Q. Then do you have some other time in mind that you made a phone call? [65]

A. I have called him at different times to find out about work and things like that.

Q. The thing I had in mind that you called him about was a deer. A. No.

Q. Didn't make a phone call and tell him there was something in Haskins' basement? A. No.

Q. You don't recall that?

A. No, not that I remember of.

(Testimony of Charles M. Dake.)

Q. Well then what did you do after you disposed of the two deer; then what did you do?

A. Well, I came down to—back down to Gales Creek.

Q. And what time was that, approximately?

A. Oh, I don't—it was right around 10 o'clock, something like that, when I got back down to the boarding house.

Q. How were you dressed, work clothes?

A. Work clothes.

Q. Then what did you do when you got back down to the boarding house?

A. Well, Mrs. Adkins' family was coming in for dinner and I didn't want to be around there with the whole family so I asked her if she would fix me something I could eat—I just had all my lower teeth pulled out the day before—so she fixed me some soup, and I went out and put the gun in the car and left.

Q. You had the gun—you took the gun in the house when you [66] returned, then?

A. I don't know whether I took it in the house or not, but I think—I know I took it out of the pickup but I don't know whether I took it in the house or the wood shed.

Q. After you got lunch and got the gun and went back and got the truck——

A. Yes.

Q. —what were you going to do then?

Mr. Powers: Well, if he did anything.

Mr. Miller: Q. If anything.

A. Well, I was going to go out hunting.

(Testimony of Charles M. Dake.)

Q. Started off to go hunting again?

Mr. Powers: That is all leading. Just ask him what he did.

Mr. Miller: Q. Well, just tell his Honor what you did, from where you started, what you were going to do, what you did.

A. I started to go hunting and I got about a mile, mile and a half, I guess, from Gales Creek and I seen a couple—two men and a woman walking along the road and I stopped and picked them up and ask them where they was going. They said they was going to Tillamook. I told them I didn't think I could go that far; didn't right at the time. So I drove on up the road a ways and I decided I would go on to Tillamook too. I didn't have no intentions of going over there at the time. So I took them over to Tillamook. And I thought, Well, I had the gun along, maybe I might see something too. Went over to my uncle's place [67] and stayed over there for a while, and I had a cousin over there I wanted to see, and he wasn't home so we ate lunch there and I stayed—I don't know just how long we was there. Anyway we left and I thought, We will go back around the other road and come across the Wolf Creek. We stopped up at Twin Rocks for quite some time, and left there and started on back to Gales Creek and it was after night and, oh, it was I don't know just how far that is. Anyway it is where that overhead crossing of the Oregon-American—where the Oregon-American overhead crossing crosses the highway, we just

(Testimony of Charles M. Dake.)

passed that where we had the collision, and from there, why, I went to the hospital.

Q. When you started off the second time you were going to do some more hunting?

Mr. Powers: Now we will object to that. He has been over it and he is suggesting he was going to do more hunting.

Mr. Miller: I am not suggesting. I understood you to say that.

Mr. Powers: I think it is improper. It is direct examination, your Honor, and for reasons that are going to be developed here I think it is all the more improper. Counsel has seen the record before. This is a new element that he is suggesting into it.

Mr. Miller: I didn't get the remark.

Mr. Powers: I said you have been all over this record, you [68] know what happened before. It was your contention before he was going down to hire somebody looking for work, looking for somebody that might want to work up there. You have got this new element injected in here now he was going hunting. You took his deposition; you heard his testimony before.

Mr. Miller: All I am trying to get is the true facts. I think that is what the witness is now telling the Court.

Mr. Powers: I am objecting to it specifically on the ground it is leading, your Honor.

The Court: Go ahead. It seems to me he is developing it all right; slowly but all right.

(Testimony of Charles M. Dake.)

Mr. Miller: Q. I believe you said you were going—put the gun back in the car and started off again——

Mr. Powers: I object to that, too. He can ask him what was done.

Mr. Miller: May I finish the question?

The Court: Start over again. You will have to untangle the lawyers.

Mr. Miller: ——started off the second time really did you intend to go hunting?

A. What I intended when I left Gales Creek, I intended to go back up on Round Top; that is where I was headed for.

Q. And did you intend to take another road in there; is that the——

A. Well, I was planning on going around—to tell you I never [69] did say just the exact reason for going up there, but I was—I went up there—I knew where there was an iron camp cot and it had been left up there from logging before and it was in good shape and I knew where that was at and I knew it was pretty good; so I intended to go after that and on the way I met these people, started to pass them and I picked them up. I told them I would take them as far as I was going, and at the time I got as far as I was going I got the intention to go on to Tillamook, too; so that is the way I gone to Tillamook.

Q. How far was Tillamook from this point where you intended to turn off?

A. Oh, it must be forty miles, I should judge. I

(Testimony of Charles M. Dake.)

wouldn't say for exact mileage, somewhere in the neighborhood of forty miles.

Q. Did you use the pickup truck on Saturday, June 27th? A. Yes.

Q. For your own personal use? A. Yes.

Q. What was the nature of that use?

A. My teeth had been bothering me for some time and I finally got up nerve enough to have them pulled and I went down to Hillsboro to the dentist's and had all my lower teeth pulled out Saturday morning.

Q. Did Wells know about that?

A. No, I didn't tell him anything about it; didn't know it until Monday morning when I come to work, I come to work with- [70] out any teeth.

Q. And you drove over to Tillamook—by the way, had there been discussion between Mr. Wells and yourself and other members of the crew regarding the shortage of help in the woods?

A. Oh, yes, we had talked about it ever since we lost the rigging sling.

Q. Was Wells anxious to get a man for that job?

Mr. Powers: We will object to that, your Honor.

Mr. Miller: My point is there, your Honor, that I would believe that the Astoria case would decide the issue as to agency, as to whether or not Mr. Dake at the time of the trip was an agent of Wells; and that, as I see it, was the issue in the Astoria case, and, of course, I believe that is *res judicata* here, and I just want to tell the Court about it and

(Testimony of Charles M. Dake.)

I don't care to go into it unless Mr. Powers intends to make an issue about it. I think the only question here is the one as to permission, permissive use. There was a lot of testimony, as Mr. Powers stated, in the Astoria case, and he has offered that testimony in evidence regarding the agency feature. There has been an adjudication on it in Astoria and I think that was the issue in Astoria as against Wells. There is no question about that.

The Court: Well then, agency is the broader concept.

Mr. Miller: As I see it, under our state court decisions, that the only way in which Wells could be responsible in the [71] state court was the finding he was *respondiat superior*, and at the time——

The Court: He went over that the other day; the jury found it was and Judge Peters set it aside.

Mr. Miller: And the finding in the state court case that Mr. Dake was using the truck with permission, of course, would have been a moot question, that wouldn't have decided anything as against any of the parties in the state court case.

The Court: That is what I was driving at; I asked if agency is the broader concept than permission.

Mr. Miller: Yes.

The Court: Well, go ahead; let's get this man's story here. Can't you light out here and tell your own story? You have been examined a lot of times.

Mr. Miller: I would be glad to have you do it.

(Testimony of Charles M. Dake.)

The Court: Tell why you went down here. I read the facts you gave before. You said in your deposition you took a shine to one of the women is why you went on.

A. That is the reason I went on after I picked them up.

The Court: And you did some drinking down there?

A. Yes.

The Court: And you said something in your deposition about a man down there. Did that have anything to do with it?

A. Well, I had a cousin that I figured if he had—he wasn't working, if he had—if he wouldn't go up and go to work. I [72] knew Mr. Wells would take him if he hadn't got work himself. I got down there and he was—he was already working in the shipyards.

The Court: You said a minute ago, having a gun, you thought you might also see something to shoot down there.

A. I had that in mind when I started out.

The Court: I know, but after you started to go to Tillamook you didn't have any use for the gun then.

A. Couldn't take it out after I had seen them along the road there without coming back. I figured if one jumped out in front of the car I would go get him.

The Court: Really you changed your plan and

(Testimony of Charles M. Dake.)

went on down to Tillamook on account of running into these girls; was that it?

A. That is the main reason I went to Tillamook.

The Court: Did you have any further questions?

The Witness: If I hadn't picked them up I wouldn't have went to Tillamook.

The Court: No. Any further questions? Isn't that the whole story?

Mr. Miller: With this one or two exceptions.

Q. Did Mr. Wells ever tell you that you couldn't use the truck at any time?

A. Well, I don't know as he ever took and told me unless since I have been back.

Q. Since you have been back he told you you can't use it? [73]

A. Yes.

Q. You used it on many, many occasions before; is that correct?

A. I used it, drove it several times.

Q. Was it understood that Mr. Wells was to get some of the deer meat if you got some?

A. Well, I was supposed to give everybody some if I had had a chance; but I landed in the hospital and I didn't get a chance to cut it up.

Q. Mr. Wells understood that?

Mr. Powers: We object to what Mr. Wells might have understood. You might ask him whether he told Mr. Wells he would give it to him; or something. What he understood, that is a little too indefinite.

(Testimony of Charles M. Dake.)

The Court: Well, I have my own ideas about it, only I never get any deer meat. What is understood and what you get is a different thing. Somebody else always gets their first.

Mr. Miller: Q. Were you going to answer that question?

A. Well, I don't know what the question was.

The Court: Wells knew you were going deer hunting. Was he expecting you, if you had luck, to give him part of the meat? Were you expecting to give him part of the meat?

A. Well, I expected—I think he expected to get some of it the same as all the rest of the boys if I got a chance to give it to him.

Mr. Miller: I think that is all. [74]

The Witness: I give it to everybody in the camp.

Cross Examination

By Mr. Powers:

Q. You have been working all night and your voice is not up to standard?

A. Yesterday I couldn't answer any of your questions very handy, and the day before.

The Court: Probably you will be in the same fix tomorrow. This won't do you any good.

Mr. Powers: Q. Mr. Dake, you first were working on the other side of Round Top when you went to work in July, 1941; is that right?

A. Yes.

Q. And you have testified that you used the

(Testimony of Charles M. Dake.)

pickup truck over there on several occasions to go hunting. A. Yes.

Q. And then you said that you used it on one occasion to go down to Timber, I think, to get some beer. A. Right.

Q. And you said that Mr. Wells didn't know about your taking it down to Timber; is that right?

A. Well, I didn't tell him nothing about that.

Q. And that sometimes you took the truck to go hunting when Mr. Wells was there and sometimes you took it when he wasn't there, on the other side of the mountain where you first worked. [75] Did you ever take it when he was there without asking his permission?

A. Well, I don't know for sure about that, but I know if he was—happened to be out some place and I took a notion to go and it was in camp, I would get the gun and take off with it.

Q. Let me ask you this, though: When Mr. Wells was at camp when you were ready to go hunting, did you ever take that truck without asking his permission?

A. Well, I wouldn't say I did or I didn't because I don't remember. Just as I say, if I had wanted to take it I would have took it without asking him. I could have got back, but I would have took it; I would have figured it would have been all right because I had used it to hunt anyway.

Q. This was especially good for the timber country, wasn't it, the truck? A. That is right.

(Testimony of Charles M. Dake.)

Q. And you say that time, which was a year before the accident, was when you were working over on the other side, on the other job?

A. Yes.

Q. And the only use you put it to was to go hunting there around the camp on the mountain; is that right? A. Well, you mean me?

Q. Yes, you; when you used it.

A. Yes, I did one time. [76]

A. Yes, I did one time.

Q. When you went down to Timber it was without his knowing it? A. Yes.

Q. Then there was a gas pump over there, wasn't there? A. Yes.

Q. And when you left that job and came over on the other side there was no gas pump, was there?

A. No.

Q. So any gas you bought was on the other job; is that right? A. Yes.

Q. And you say you may have put some gas in the truck over there a time or two?

The Court: How about the gas you used on this Sunday? Let's have the fact about that.

Mr. Powers: I will come to that, your Honor.

Q. You had a friend over there that had a car, on the other side of the mountain, didn't you, that you and he used to buy gas for? A. Yes.

Q. You bought quite a bit of gas for that car from time to time; isn't that a fact?

A. Well, I bought some; I don't know how much.

(Testimony of Charles M. Dake.)

Q. You bought a lot more for the car than you did for the truck?

A. We generally split fifty-fifty on the gas when we come into town.

Q. Your friend and you, when you used that other car? [77] A. Yes.

Q. You would make out this same kind of ticket you are talking about? A. Yes.

Q. Now when you left Wells, which was on Friday night two days before this accident, and you left at Oregon City or Jennings Lodge, wherever he lives; is that right? A. Yes.

Q. You testified he told you to take the truck back to Gales Creek; is that right? A. Yes.

Q. And did you take it back there?

A. I took it back to Gales Creek.

Q. Yes. Now what is the fact as to whether Sheldon, I think his name is, Corvin Sheldon, was to repair the yarder whistle on Sunday?

A. Well, I don't know whether he was—Mr. Wells give any orders to that effect or not, but then I know that Sheldon said we would fix the whistle when we went up hunting; but Sheldon and me was going to go hunting together, and we always figured on fixing that whistle while we was up there.

Q. Wasn't Sheldon to have the use of that truck that day to go up there to fix that whistle, to start out Sunday morning?

A. I didn't understand it that way.

(Testimony of Charles M. Dake.)

Q. Hadn't you testified to that effect in your deposition and [78] also on the trial——

A. Well, I say there was two of us and I don't know whether I was supposed to drive it from Gales Creek up there or whether he was supposed to, as far as that goes.

Q. Well, yes; but didn't you testify——

A. As a general rule, yes, he drove because he was a better driver than I was.

Q. Yes; but wasn't it a fact that the truck was up there so Sheldon could take it up to fix that whistle and you were going to go along to ride so you could go hunting?

A. Yes; and there was another agreement between Sheldon and I, if he was not there I would take it and go anyway.

Q. That was between you and Sheldon?

A. Yes.

Q. But that wasn't between you and Wells then, was it?

A. Well, I don't know whether Wells knew anything about it or not.

Q. No. Well, your understanding with Wells was that Sheldon was going to take that truck up to fix the whistle and you were going to ride up with him to go hunting, wasn't it?

A. He didn't tell me I couldn't drive it.

Q. But isn't that what was said there in the truck, that Sheldon was to go up Sunday morning to fix the whistle and you wanted to go along so you

(Testimony of Charles M. Dake.)

could ride up there to go hunting; that was the reason you went over and got the gun? [79]

A. He and I was going to go hunting; he and I was going to go hunting together.

Q. You and Sheldon? A. Yes.

Q. But what I am asking you about now is about Wells' arrangement there. He told you to take the truck back to Gales Creek, didn't he?

A. Yes.

Q. And you took it back? A. Yes.

Q. Wasn't your understanding with Wells that Sheldon would go up there and fix the whistle and you were going to ride up with him because you wanted to go hunting?

A. My understanding of it was Sheldon and I was going to go hunting and we was going to fix the whistle. There was no—I don't know whether Sheldon was supposed to be paid additional for the job or not. I don't know whether he had any orders to that effect.

Q. You said that it was your understanding with Sheldon a while ago you two were going to go hunting; is that right? A. Sure.

Q. Did you have that understanding with Wells?

A. I don't know whether I said anything to Wells about it or not.

Q. I will ask you this: Isn't it a fact that Wells, in your presence there, made arrangements with Sheldon to take the truck [80] up on Sunday morning to get that whistle working?

A. Well, now, as I said before, I don't know

(Testimony of Charles M. Dake.)

for sure. As I told you, I didn't hear him give Sheldon any orders to that effect.

Q. Well, let's see.

A. He didn't tell me every time he gives a man an order.

The Court: Did you have a lawyer in Astoria when you pleaded guilty?

A. No. I wish I had of.

Q. Well now, on direct examination I will ask you whether you didn't give this answer: Mr. Wood was asking the question about this arrangement. "Well, the question was asked about this Mr. Sheldon and myself, after we had left Mr. Wells, was talking this over, I told Sheldon if he didn't get there, didn't get there Sunday morning, why I might take out the pickup myself and go up on the hill. But, I never had asked Mr. Wells about it, so he didn't know anything about that part of it. Sheldon didn't show up that morning, and I left there and went up on the hill for awhile and came back. I don't know whether Sheldon was there while I was gone or not, I didn't see him, but Sheldon was supposed to go up there and fix the whistle, I was going on a hunting trip if anything should show up around there, run into somebody I wasn't supposed to, I could have this excuse, I was up there helping to fix the whistle. Sheldon was the man that was supposed to fix the whistle himself, [81] but, as far as Sheldon himself going on a hunting trip I don't know whether he intended to go, to bring a gun himself, or not." You made

(Testimony of Charles M. Dake.)

that answer in the trial down at Astoria, didn't you?

A. I did, yes. I didn't want to get nobody else in no trouble that I was already in, all of my account over this damn hunting trip. I am getting tired of it and I want to tell the truth of it.

Q. I didn't bring in the hunting trip; they are bringing it in. But what I am asking you, isn't it a fact that Wells told Sheldon to fix that whistle on the yarder on that Snuday morning?

A. I think I have answered that once. I think I told you that I don't know for sure whether he did or not. He didn't tell me every time he gives an order.

Q. I will ask you, isn't it a fact that he told you in your presence while three of you were in the car?

A. Well, I know there was something mentioned about fixing the whistle. I know Sheldon and me was when we got up there. He and I didn't figure to take—didn't see it would take but a few minutes to do it and we would have that done. We didn't expect nothing for it. I didn't anyway. I was going up there to have a time.

The Court: Had you hunted with Sheldon before?

A. Yes.

The Court: Did he have a gun of his own?

A. Yes. [82]

The Court: Hunt with him several times before?

(Testimony of Charles M. Dake.)

A. Oh, I had hunted with him a couple of times.

The Court: Did he always bring his own gun?

A. Yes.

The Court: I suppose you expected him to bring his own gun this time?

A. Why, certainly.

The Court: What?

A. I sure did. I would have borrowed his gun if he hadn't.

Mr. Powers: Q. You what?

A. I said if he wasn't going hunting there wouldn't have been any use for me to go down there after Mr. Wells'.

Q. Well, let's see.

The Court: Before I forget it, I want to find out about the gas.

Mr. Powers: This would be a good time, then, your Honor.

The Court: Let's try to finish this up before noon.

Mr. Powers: You want to——

The Court: I want to know if he left Oregon City—of course, he couldn't have gone everywhere until the time of the accident without putting more gas in; he must have put more gas in some place after he left Oregon City Friday night. Remember about that?

A. I was waiting for the gun.

The Court: What did you do about the gas? [83]

A. Well, after I had went up on top of Round Top—not the top, but up there on the yarder hunt-

(Testimony of Charles M. Dake.)

ing, I drove it right on up to the yarder, and I thought, "By golly, I better check the gas, because there may not be enough gas to hunt and get back up here," so there wasn't a great deal in the tank and I filled it up. That pickup burned quite a bit of gas.

The Court: Where did you get that gas?

A. Down at Gaston there at the loading tank.

The Court: There was nobody else there?

A. No.

The Court: That was gas that belonged to the job?

A. Yes, it belonged on the job. That is what we always filled the tank up with.

The Court: Then what else did you do about gas?

A. I took a five-gallon can and filled that up with gas too and put it in the pickup, because I figured on doing quite a lot of hunting and I wanted to be sure there was enough gas to get back.

The Court: Did you put in any more gas before the accident other than that?

A. No.

The Court: And that carried you through?

A. I think that five-gallon can was still in the pickup at the time of the accident.

The Court: You don't think you had used that?

[84]

A. No.

Mr. Powers: Q. Did you have Mr. Wells' per-

(Testimony of Charles M. Dake.)

mission to take gasoline and put in the truck that day?

A. No; I figured on putting it in there. I didn't have no intention to go any place, just on that hunting trip when I was up on Round Top. I hadn't met the people yet.

Q. Well, you didn't have his permission to take the gas at any rate?

A. Why, I didn't—I had no actual permission to put it in there, no.

Q. Did you have Mr. Wells' permission to drive the pickup truck over to Tillamook and around to the beach and down Wolf Creek highway where this accident occurred? A. No.

Q. Now there are two roads, as I understand it, Mr. Dake; one is the Wilson Creek highway; is that right?

A. Wilson River and the Wolf Creek.

Q. Yes. Which road was the boarding house on where you stayed at Gales Creek?

A. Well, that there is the—I think you would call that on the Wilson River.

Q. Wilson Creek?

A. Wilson River. You could call it either one. You wouldn't either now since the new road opened.

Q. It is the Wilson River there, isn't it? [85]

A. Wilson River.

Q. And then going to work from where Haskins live you would go on the Wilson River Road?

A. Yes.

(Testimony of Charles M. Dake.)

Q. And then to come to your job up where the logging was going on, where would you go from the Haskins' place?

A. Well, about—oh, twelve miles or so on up the Wilson River highway to where our logging road took off.

Q. Would that be toward the coast?

A. Yes.

Q. And you were going along——

The Court: Pardon me. The logging road turned off on the right or the left?

A. To the right.

Q. And you were going along that road when you met the people on that road that you picked up?

A. I picked them up just shortly after—about a mile and a half from Gales Creek.

Q. About a mile and a half from Gales Creek. Were you on the Wilson River road then?

A. Yes.

Q. How many persons did you pick up?

A. Three.

Q. And what were they, men or women?

A. Two women and a man. [86]

Q. Did you have something to drink on that trip then? A. Yes.

Q. Had you had anything to drink before you picked them up?

A. Not since I got up that morning.

Q. Then when did you first start drinking after you picked them up?

(Testimony of Charles M. Dake.)

A. Oh, later on down the road a ways.

Q. Well, did you stop?

The Court: You didn't have anything along with you?

A. No, not right at the time; but I got some.

The Court: You hadn't had any during the day?

A. No.

The Court: Nor in the car?

A. None in the car.

Mr. Powers: Q. Where did you get some?

A. Got some at Tillamook myself.

Q. But did you have something to drink before you got to Tillamook? A. Yes.

Q. Where did you first stop for a drink?

A. Well, we had pulled off up—oh, just about—right close to the Consolidated—what is the name of the mill up there; that Consolidated mill we used to always call it. We pulled off the road there in a little park and had three or four drinks there.

[87]

The Court: They had it with them?

A. Yes.

The Court: They had it with them?

A. Yes. And then that is what decided me to go on to Tillamook. I kind of liked the looks of that girl that was in there.

Q. You had three or four drinks there and you liked her looks so you went on to Tillamook. That was what time, when you started out there from Gales Creek?

(Testimony of Charles M. Dake.)

A. About eleven in the morning, as near as I can judge.

Q. And you picked the passengers up about the same time then a mile and a half away?

A. It would be either five or ten minutes.

The Court: You hadn't come to your turnout?

A. Oh, no; quite a long ways from it.

Q. When you met them and——

The Court: No; when you stopped to have your drinks you hadn't come to your road?

A. No; about six, eight miles before we got to it.

Q. You stated that you had your drinks there and you decided then you would go on to Tillamook; is that right? A. Yes.

Q. And that was about a distance of forty miles?

A. Well, it wasn't quite forty miles from there, or a little farther.

Q. Possibly farther. And then what time did you get to Tillamook? [88]

A. Well, I don't know just for sure when it was I got down to my uncle's place; they got through eating dinner but hadn't cleared up the table yet.

Q. You mean their noon meal? A. Yes.

Q. Then you stayed there for awhile?

A. Oh, yes, quite a while.

Q. And you had some drinks there, as I understand it? A. I had a few.

Q. Then from there you decided to go over to the beach somewhere, I believe?

(Testimony of Charles M. Dake.)

A. Yes; we wanted to go over to the beach. I didn't want to drive back along the other way so I said we would take the Wolf Creek back. Well, if I had went to the beach from there and come back on the Wilson River I would have been just going the opposite direction. I wanted to get to the beach. If I would drive up the Wolf Creek I would still be on the road home and I would hit the beach.

Q. So you went over to the beach from Tillamook? A. I went up on the Wolf Creek.

Q. Yes; but I mean you left Tillamook and went to the beach some place. That was the next stop? A. Yes.

Q. How far from Tillamook to the beach?

A. Oh, I don't know just how far it is to Twin Rocks. [89]

Q. Approximately?

A. That is hard for me to say.

Q. What?

A. That is hard for me to say. I have been over that road hundreds of times, I guess.

Q. Forty miles? A. Oh, no.

Q. Ten miles?

A. Might be seven miles, eight miles, somewhere around there. I don't think it would be much farther than that.

Q. Seven, eight miles. What time did you get there? In the afternoon? A. Yes.

Q. Then did you go down on the beach?

A. Towards evening.

(Testimony of Charles M. Dake.)

Q. Did you go down on the beach then?

A. Yes.

Q. And you stayed on the beach about how long?

A. Oh, I don't know; it was after dark.

Q. Several hours?

A. Quite a while, yes.

Q. And did you have something to drink down there? A. Yes.

Q. And then you came back. After you left the beach what time did you start back to Gales Creek?

A. Well, I don't think it was—it must have been around 9 [90] o'clock anyhow, somewhere around there.

Q. And then you were coming back on the Wolf Creek highway from the beach when this accident occurred? A. Yes.

Q. That is an entirely different highway from the Wilson River highway?

A. That is right.

Q. And where would that bring you out then? You would have to come down to get on the Wilson River highway some place to get to Gales Creek.

A. Come through Timber on the old highway.

Q. Come into Timber on the Wolf Creek. How far is Timber from Gales Creek?

A. Oh, must be 28 miles, something like that.

Q. How far? A. Around 28 miles.

Q. It would be 28 miles from Timber back to Gales Creek?

A. From Gales Creek to—Timber to Gales Creek?

(Testimony of Charles M. Dake.)

Q. Yes. How far would you say it is from the beach where you stopped down to Timber?

A. Oh.

Q. Over the Wolf Creek, the way you came.

A. I don't know. Let's see, maybe sixty miles. It is pretty hard for me to figure.

The Court: I am surprised you had enough gas. What gas [91] mileage did you get on that car?

A. Gosh, I don't know. I never put any more in it.

Q. That would be about 136 miles that you traveled from the time you left Gales Creek until you were—if you got back there on the way you were traveling. I believe that is all.

Redirect Examination

By Mr. Miller:

Q. Do you know how much that tank holds?

A. No, I don't.

Q. By the way, this pickup is just a small pickup truck in the nature of a commercial truck like one of these grocery trucks?

A. It is a ton or ton and a half, three-quarter—darn if I know. I think it is a ton.

Q. Was there any restriction on where you could hunt? A. No.

Q. You may hunt any place?

A. No; there never was any restriction on me where I could hunt.

Q. Just go hunting?

(Testimony of Charles M. Dake.)

A. I started out hunting. I was going where the camp was at.

The Court: Had you used Mr. Wells' gun to hunt before?

A. Yes.

Q. When you were up at the first camp that is the only gun you did use, wasn' it?

A. Left it in the camp all the time; kept it in the bunkhouse.

Q. Did you have a gun of your own? [92]

A. No.

Q. You went hunting several times, did you, always using Mr. Wells' gun?

A. If he wasn't going to use it I would take it. If he said he was going to use it I would get another one.

Q. There were shells for the gun in the truck, were there?

A. Yes. I had some shells that had been in the truck ever since last hunting season.

Q. At Tillamook did you inquire for Mike Louis? A. Yes.

Q. And you were looking for him——

Mr. Powers: Well now, this is opening up a new subject. If you want to extend it, but I thought you weren't going to pursue this from your statement here, that that matter was *res judicata*.

Mr. Miller: If I am wrong I will withdraw it. I thought you had brought it out.

Mr. Powers: I didn't ask him about it. I only went into a subject that you opened up.

(Testimony of Charles M. Dake.)

Mr. Miller: Q. When you started back from Tillamook to Gales Creek, was it dark or not?

A. What is that?

Q. Was it dark? A. When?

Q. When you started back from the beach to Gales Creek. [93]

A. Oh. It was getting dark when I left the beach.

The Court: He told me he inquired from somebody over there and found he was working in the shipyards. Is that the man Wells talked about?

Mr. Miller: Yes.

Q. Now where did the accident happen, how far from Gales Creek?

A. Well, it must be thirty miles, I guess, something like that.

Q. Where does the Wolf Creek highway that you were returning on—does it join with the Wilson River highway?

A. Well, where the Wolf Creek highway—you leave the Wolf Creek highway just before you get into Timber and you take the old road across and it comes out—comes into the Wilson River highway about twelve miles, I guess, from Gales Creek. It is the old original highway through that country to Seaside.

Q. Did Wells ask you to look out for *me*, to see if you could find one?

Mr. Powers: We are going to object to all this, your Honor. That certainly is *res judicata*, that matter.

(Testimony of Charles M. Dake.)

The Court: It is one of the points of the case. Let me ask something.

Mr. Powers: May I ask this—we will have an exception to it, if the Court please. May we have an exception to it and we can get along faster?

The Court: Yes, certainly.

Mr. Miller: Q. Wells asked you to look out for men? [94]

A. Yes. He told every man that worked for him he was looking for good men, not only me but every other man. He said, "If you see a good man," why, he said, "I want him."

The Court: Of course you have a question of causation here, gentlemen. When he got fired up with whatever he was drinking, why, he got some different ideas in his head—I suppose you will argue all that; but I can see the—what is it you call these automobile cases—intervening cause that breaks the chain of causation. So you have the intervening cause of alcohol. As far as his intention was concerned his story is very plain: He was going back to get himself some more meat. But he met the ladies and the gentlemen and he had three drinks, I think he said, and then he got some other ideas. Not an uncommon occurrence. It wasn't his original plan at all; he said so.

Mr. Miller: Q. And the man you were looking for was Mike Louis?

A. That is the fellow I intended to bring over. I knew he wouldn't be a rigging slinger, but I

(Testimony of Charles M. Dake.)

could use him over there as a second loader if he would go out in the woods.

Q. He was your cousin?

A. Yes. That would be if Mr. Wells would hire him after I had found out whether he was there or not.

Q. Pardon me?

A. I said I didn't know whether Mr. Wells would hire him after [95] I had found him, whether he was there or not.

Q. He was the man you had in mind?

A. I had him in mind. I was going to either bring him over or have him call Mr. Wells.

Q. When you got down to the turnout your first intention, as his Honor suggested, was to get back up in the woods to Round Top to do your hunting?

A. I had intended to.

Q. Did you intend to continue that hunting over toward Tillamook?

A. I knew there was another place down the road a ways, there was an old logging road went in; I would go on down there if I couldn't find any on Round Top.

Q. You had seen deer all up and down that road to the coast before?

A. Oh, yes, hundreds of them.

Q. Where was this other place you speak of now?

A. I don't know the name of the place. It is a little logging road goes in just over the summit some place.

(Testimony of Charles M. Dake.)

Q. How far from Gales Creek?

A. Oh, I suppose 20 miles, 25 miles.

Q. 20 or 25 miles? A. Yes.

Q. Had you ever driven the truck to Tillamook before? A. Yes.

Q. This same truck? [96] A. Yes.

Q. On what occasion was that?

A. Well, I drove it over there for—Paulson Taylor borrowed the pickup to go after some parts for the truck; and when he got the truck together, when he got the truck put back together and he got back to Forest Grove it was too late to catch bass. Well, he said, “Mr. Wells told me if I was late I could have permission to use it.” Now I don’t know whether Mr. Wells give him that permission or not. He told me he did.

Q. But you drove over to Tillamook anyway?

A. So I drove the pickup for him.

Q. Did you tell Wells when you came back?

A. No, I didn’t say anything. It wasn’t none of my affair. I supposed he had loaned it to him.

Mr. Powers: We object to that and move the answer be stricken. It is hearsay and certainly is not binding on this plaintiff.

The Court: Wait a minute. It may remain subject to the objection.

Mr. Miller: Q. Ever drive the truck to Portland?

A. Yes.

Q. More than one occasion?

(Testimony of Charles M. Dake.)

A. Once, I think, was all. I don't remember of doing any other haul.

Q. Was Wells with you at that time? [97]

A. No.

Q. By yourself?

A. No. My wife and I started to make up and I come down and got some household gas and brought that back up.

The Court: We have heard about that already.

Q. Did Mr. Wells know about that trip; did you ask him?

A. I asked him for it, told him what the reason was for, and he told me I might use that if I would be careful.

Q. Did you introduce Mr. Wells to some of the union executives here in town? A. Yes.

Q. That was here in town? A. Yes.

Q. How did you get into town on that occasion?

A. I don't think that—we were broke down. Mr. Wells and I come in after some parts.

Q. Came in on the truck?

A. I think it was.

Q. The purpose of that was to establish relation with the union people so you could get men to work; is that correct?

A. Yes, if they had them. I didn't say we could get them.

Q. Have you used the truck to hunt many, many occasions?

Mr. Powers: He has been all over this, your

(Testimony of Charles M. Dake.)

Honor. I deliberately shortened my cross examination up. He specifically proved this, that he went hunting the same year before this. [98]

Mr. Miller: That is all, your Honor.

Mr. Powers: No questions.

The Court: That is all.

(Witness excused.) [99]

MRS. J. J. ADKINS

was thereupon produced as a witness in behalf of the defendants, and, being first duly sworn, testified as follows:

Direct Examination

By Mr. Miller:

Q. Mrs. Adkins, you operate the telephone office at Gales Creek? Q. Yes, sir.

Q. And likewise you board some of the men there who work for Mr. Wells? A. I do.

Q. Charles M. Dake board with you?

A. Yes; when they work he does.

Q. Has he boarded with you recently?

A. Well, the month before the work shut down after this storm; he was with us before about a month.

Q. The past month he has been boarding with you? A. Uh huh.

Q. Did he board with you during the month of June, 1942, last June? A. Yes, sir.

Q. And for how long prior to that?

(Testimony of Mrs. J. J. Adkins.)

A. Well, he came to our home in January.

Q. Of 1942? A. Yes, sir.

Q. And he was there then until the end of June, 1942? [103]

A. Yes; he was there until the accident.

Q. Was there a red International pickup truck that was used by the men who were boarding there?

A. You say, Was there one?

Q. Yes. A. Yes, sir.

Q. Was that stored at your place?

A. Well, no, not very much of the time. It never was at my home at all until at the middle of May, and from then on. That is, I mean when it was left there, from then on until the day this accident occurred.

Q. It was stored in your yard at Gales Creek?

A. In the evenings when they would come home from work and stayed there until they went back the next morning.

Q. Now on the week ends during that period from May, you say, until the end of June, was that truck stored there at your place?

A. Week ends, you say?

Q. Yes.

A. Just roughly three or four times, two or three times; I don't know just exactly.

Q. Well, was it there most of the week ends or was it gone?

A. No. Most of the week ends—I don't think it was there over two or three times at the outside.

(Testimony of Mrs. J. J. Adkins.)

I know it wasn't over four times; maybe only three, because I didn't keep books on the truck.

[104]

Q. Well, did you know to what use it was being put during that time?

A. Just for the job, to take the men back and forth to their work.

Q. Well, I mean on the week ends.

A. Well, while it was left there it was left there; when it wasn't left there I don't know where it would be.

Q. You don't know where it was on the Saturdays and Sundays? A. No.

Q. You are the telephone operator at Gales Creek; you said that? A. Yes, sir.

Q. Do you recall putting in a call from Mr. Dake——

A. No, I didn't handle——

Q. On the Sunday of the accident?

A. No, I didn't handle any call for Mr. Dake.

Mr. Miller: That is all, your Honor.

Cross Examination

By Mr. Powers:

Q. Well, let me ask you just a question or two. You say the truck was left there and was used for the job of getting the men back and forth?

A. Yes, sir.

The Court: Is it your information, Mr. Miller, that there was a telephone call from Dake to Powell?

Mr. Miller: Yes, it is, your Honor. [105]

C. F. RICHARDSON

was thereupon called as a witness in behalf of the defendants, and, being first duly sworn, testified as follows:

Direct Examination

By Mr. Miller:

Q. Give Mr. Michelet your name. [107]

A. C. F. Richardson.

Q. Your name is C. F. Richardson?

A. That is correct.

Q. You keep books for Mr. C. E. Powell?

A. I am a public auditor.

Q. Pardon me?

A. I am a public auditor.

Q. Public auditor.

A. And in that capacity I keep records for Mr. Powell, yes.

Q. Do those records include the time records and employment records and other such records in connection with the operation of a logging camp by Harold F. Wells?

A. May I call your attention to the fact that the Powell account and the Harold F. Wells account are entirely separate organizations. They have no inter-connections whatever.

Q. All right, sir; I didn't understand that. I am glad to have you tell me. They are two separate accounts.

A. Two separate organizations entirely.

Q. The Harold E. Wells account, then. You have such an account for Harold E. Wells?

A. That is right.

(Testimony of C. F. Richardson.)

Q. And as a public auditor you keep his records? A. That is right.

Q. Now in keeping those records you have employment records; you have records relating to the use of an International pickup [108] truck?

A. Not particularly, no, sir.

Q. In your records you have, of course, pay roll records? A. That is right.

Q. And one Charles M. Dake appears on that pay roll, does he? A. He does.

Q. And during the years 1941 and part of the year 1942.

A. Part of the year 1941 and part of the year 1942.

Q. And do you make out the checks?

A. I do.

Q. And do you ascertain the amount due each employee for each particular payday, how much he is to receive? A. That is right.

Q. I appreciate the fact that you do not set the amount of pay, but upon the basis of what Mr. Wells tells you, you figure up how much is due; is that it? A. That is right.

Q. And make proper deductions?

A. That is right.

Q. Now with reference to Charles M. Dake did you make deductions for gas used by Charles M. Dake? A. Yes, sir.

Q. Can you approximate how many times you may have made those deductions for gas?

A. Oh, maybe five or six times. I have never counted them. [109]

(Testimony of C. F. Richardson.)

Q. No. You say on five or six different occasions you made deductions for gas which was charged to Charles M. Dake?

A. That is right.

Q. Now where was that gas obtained, do you know?

A. Yes. It was obtained at the C. E. Powell pump at what we call Round Top Mountain. That is part of our operation.

Q. At the C. E. Powell pump at the Round Top operation? A. Yes, sir.

Q. Dake at that time was working for Wells?

A. That is right.

Q. And you have your ledger here, do you not?

A. Yes, sir.

Q. And it shows those gas deductions?

A. That is right.

Q. After you are excused from the stand would you be good enough to look in there and find how many occasions on which you charged gas to Dake and be good enough to return and tell us?

A. Yes, sir.

The Court: With the dates.

A. Yes, sir. I can give you the dates—I can give you the pay roll dates but not the date that the actual gas was taken.

The Court: That would be the following——

A. The following week, probably.

Mr. Powers: I think they all appear on this exhibit that Mr. Wells had this morning. I notice

(Testimony of C. F. Richardson.)

this on there; I think [110] they are all on there. I think that is a copy of the record.

(Discussion off the record.)

Mr. Miller: Q. You have your office at Milwaukee; is that correct?

A. That is correct, sir.

Q. Do you go out into the woods at the place of the operation? A. Not very often.

Q. You have been out there? A. Oh, yes.

Mr. Miller: I think that is all.

Cross Examination

By Mr. Powers:

Q. Mr. Richardson, I believe you are the Justice of the Peace out in Milwaukee, too, aren't you?

A. No. I was for a number of years but no longer. The people didn't want me after 1941.

Q. Well, there has been produced by Mr. Wells this morning two ledger sheets which you have certified that that is a correct copy of the books. The same information is on here about the gas, I believe, as in the books, isn't it?

A. Well, if I certify it is the same.

Mr. Powers: With the permission of the Court I will approach the witness.

Q. I see some items there stating "Gas." Is that—

A. That is right. I never made this. [111]

Q. Well, will you look and see what the last date is that any charge for gas was made against Dake? A. According to these sheets?

(Testimony of C. F. Richardson.)

Q. According to your records. If you have any other records here, if it is not all on here, any record that you have that will give the last charge made against Dake for gasoline.

(Witness leaves stand to consult records.)

The Court: Well, put on another witness while he is going over that.

(Witness excused.) [112]

ALBERT F. NELSON

was thereupon called as a witness in behalf of the defendants, and, being first duly sworn, testified as follows:

The Clerk: Will you state your full name, please.

The Witness: Albert F. Nelson.

Direct Examination

By Mr. Miller:

Q. Your name is Albert F. Nelson?

A. That is right.

Q. Where do you reside? A. Beg pardon?

Q. Where do you live? A. Tillamook.

[116]

Q. Are you related to Charles M. Dake?

A. I am, through marriage; I am an uncle by marriage. Otherwise—in other words, I married his aunt.

(Testimony of Albert F. Nelson.)

Q. On June 28, 1942, that was on a Sunday, June 28th last summer—— A. Yes.

Q. ——did you see Mr. Dake?

A. Yes, sir.

Q. Where?

A. He came to my place somewheres between twelve and one o'clock on that date.

Q. And how did he get there, do you know?

A. Why, he came in a red pickup truck.

Q. Did you ever see that pickup truck before?

A. Yes, sir.

Q. Where?

A. Why, I can't—he was over to my place once before with it somewheres—a couple months before. Anyway I couldn't say just the exact date because it is nothing that I can fix the date by. However, I am under the impression he came on Saturday evening and left the next morning.

Q. The same truck?

A. I would say it was the same truck. It is identical in color and everything else, although I never paid any attention to the make of the truck or anything else. [117]

Q. Did Mr. Dake drive it to your place? Did you see him drive up?

A. Why, I didn't see him in that time, but he was the only one that was there that time. He came of an evening and just came into the house.

Q. Was he the one that drove it away?

A. He was the one that drove it away.

Q. On both occasions?

(Testimony of Albert F. Nelson.)

A. Both occasions.

Mr. Miller: I think that is all.

Mr. Powers: Move the testimony be stricken; it doesn't tend to prove or disprove anything in this case, your Honor.

The Court: It will remain subject to the objection.

(Witness excused.) [118]

C. F. RICHARDSON,

a witness in behalf of the defendants, having been previously sworn, resumed the stand and testified further as follows: [119]

Redirect Examination

By Mr. Miller:

Q. Did you ascertain the number of times you made charges for gas to Mr. Dake?

A. Number of times?

Q. Yes.

A. I can tell you in just one second.

Q. All right, sir. [121]

A. Pretty good guess. Just six times.

Q. Six times.

The Court: And the dates, nearest dates?

Mr. Miller: Probably the amount, too, if that shows, your Honor.

A. All right; we will give them to you as they appear on this copy of the ledger sheet.

The Court: The date and the amount.

(Testimony of C. F. Richardson.)

A. August 8, 1941, \$2.20; August 22, 1941, \$1.20; September 3, 1941, \$1.80; September 19, 1941, \$1.60; October 16, 1941, \$2.25; and November 14, 1941, \$1.80.

Q. And subsequent to November 14th, or around that time, the gas pump was no longer in use; is that correct?

A. We changed around the complete operations along about that time.

Q. And you had no gas pump over at the other side? A. No.

Q. Were you out there on week ends?

A. I am sometimes; not very often.

Q. Not very often? A. No, sir.

Q. When you were out there did you have occasion to see the truck?

A. Yes, I have seen the truck out there.

Q. On week ends? A. Yes. [122]

Q. Where?

A. Oh, right by the cookhouse.

Q. That is on the old operation?

A. That is up at Round Top.

Q. Yes. And then since they have been on the other side?

A. Since they have been on the other side I don't think I have been out there.

Q. I see. You have no way of actually knowing what use was actually made of the truck?

A. I don't have.

(Testimony of C. F. Richardson.)

Q. Subsequent to the time they moved to the second site? A. I do not, sir.

Mr. Miller: That is all.

Mr. Powers: That is all.

(Witness excused.) [123]

HAROLD EDWARD WELLS

was called in rebuttal as a witness in behalf of the plaintiff, and, having been previously sworn, testified as follows:

Direct Examination

By Mr. Powers:

Q. You know where Mr. Sheldon is now? Do you know of any efforts that have been made this week to try to get him?

A. You tried to get him.

Q. And where did you tell me to try to get him?

[124]

A. At his house, Forest Grove.

Q. Do you know whether I have been able to reach him by telephone?

Mr. Miller: Mr. Powers, will you state what the facts are. I will stipulate.

Mr. Powers: I tried all this week since Monday to reach him by 'phone, and this morning again I left word at the office, and this afternoon when I was on my way here to court, if he could be reached to have him call me in court.

(Testimony of Harold Edward Wells.)

Q. Do you know where he might be then, since he is not there?

A. He has got a truck of his own working on a Government project over in Eastern Oregon, and possibly he may be over there while we aren't working. I don't know. It could be possible. How to get hold of him——

Q. He testified in the State court down at Astoria?

A. Yes.

Q. And he testified on behalf—who called him down there? Was he called for you, testify for you?

A. No.

Q. The other side called him?

A. I think they did. I am quite sure.

Q. At any rate, he was down there to testify in the case there?

A. Yes.

Q. It appears from the record there he testified as the defendants' witness. Were you there when he testified?

A. No, I wasn't. They let me testify one day and go back and [125] run the outfit while he went down and testified the next day, so we wouldn't have to shut our operation down.

Q. I see. Now you heard the testimony here by Mr. Dake that he had used this truck to go hunting with on several occasions when you were over on the first job on the other side of the mountain, as I understand it. What is the fact about that?

A. Any time that he used it over there, we was up in the woods on a private road all the time.

(Testimony of Harold Edward Wells.)

Q. Did he ever use it when you were there without you giving him permission?

A. No, he never did; not that I know of. He wasn't in the habit of taking it that way. This trip over to Tillamook was the first time I ever knew of him taking it that I didn't know of.

Q. You never knew he had taken the truck away from the job before?

A. No; I didn't know he had ever been over to Tillamook the second time with it, which this gentleman there stated a while ago?

Q. Mr. Nelson? A. Yes.

Q. Did you ever give him permission to take the truck over to Nelson's house at all?

A. No; absolutely not.

Q. And he testified that he had taken the truck down to Timber one time to buy some beer. Did you ever know about that?

A. No, I didn't. [126]

Q. Did you ever give him permission to?

A. No; absolutely not.

Q. And he testified that he took it on about two times before to go fishing a mile or two from Gales Creek. That was some time before this accident. Did you ever know about that?

A. No, I didn't know it.

Q. Did you give him any permission to?

A. No. I would have put a stop to it if I had knew it.

Q. Now he testified that you told him when you

(Testimony of Harold Edward Wells.)

took him home to take the truck back to Gales Creek; is that correct? A. Yes.

Q. And he testified that at least it was his understanding that either he or Sheldon could drive the truck up to go hunting. Did you give them any such understanding? A. No, I did not.

Q. What was it that you understood?

A. The understanding was Sheldon was going up in the woods and repair this horn on the yarder. Dake was going to go with him and do a little hunting. Sheldon testified to that, too, at Astoria.

Q. Well now, when——

The Court: That last comment may be sticken.

Q. When you stopped your work on the first job in 1941, that is where he said he had been hunting, did he do any hunting over on the other job, up until this occasion, that you knew of?

A. I don't think so. [127]

Q. Did he ever use the truck that you knew of to hunt on this—— A. No.

Q. It was always——

A. Too far, too far from the woods. Over on the other side we was living right in the woods in the camp.

Q. And he testified that he had bought gasoline on one or two occasions to put in the truck and other times to put in a car that he went fifty-fifty with.

A. Yes.

Q. Is that about right?

A. Yes. He and a fellow that was pulling rig-

(Testimony of Harold Edward Wells.)

ging for me was together and they run around lots in his car.

Q. Did you ever, up to the time of this accident, let anybody drive that truck on any pleasure trip like this trip that Dake described?

A. No, I didn't.

Q. Did you ever give him any permission to do that? A. No.

Q. Now Dake testified that any deer meat that he got there would be divided among the men at the camp, and that would include you. Did you have any, or hear any, understanding from him that he would give you any deer meat? A. No.

Q. How was it that he happened to use your gun?

A. I loaned him my gun lots of times; loaned it to any of the [128] boys working for me that wanted it.

Q. He just didn't have a gun, is that it?

A. That is it. I kept my gun over on Round Top all during hunting season. There was several of the boys used it.

Mr. Powers: I believe that is all.

Mr. Miller: No questions.

The Court: Step down.

(Witness excused.)

[Endorsed]: Filed Sept. 24, 1943. [129]

PLAINTIFF'S EXHIBIT NO. 12

TRANSCRIPT OF TESTIMONY

(During the opening statement of the plaintiff's attorney, Mr. Wood, the following record was made):

Mr. Wood: The stipulation this morning, I think was unintentionally not broad enough on the part of either of us. Will you stipulate, Mr. Norblad, with me that at the time of this accident the negligence of Dake as alleged in the complaint was the proximate cause of the death of Emmett C. Jasper, deceased?

Mr. Norblad: Yes, so far as the negligence of Dake alone was concerned.

Mr. Wood: As far as Wells is concerned, reserving, of course, your position that Dake was not, at the time of the accident—reserving any other defense you may have, are you willing to stipulate that the plaintiff need not produce any evidence here that the negligence of Dake was the proximate cause of the death of the decedent, as far as Wells is concerned?

Mr. Norblad: Yes, reserving all questions of agency, master and servant, and so forth. [2-a*]

* Page numbering appearing at foot of page of original Reporter's Transcript.

Plaintiff's Exhibit No. 12—(Continued)

TESTIMONY OF HAROLD EDWARD WELLS

A. (Continuing) I had been having some trouble with my signal horns on the yarder that day.

Q. Where was the yarder? [29]

A. Right where we were logging there on Round-top Mountain, so we left the woods——

Q. (Interrupting) Who is "we"?

A. Well, the whole crew and myself.

Q. All right.

A. We agreed that Sheldon——

Q. (Interrupting) *What* is Corwin Sheldon?

A. Yes, he was going back to the woods the next day with the pick-up.

Q. On Saturday? A. On Sunday.

Q. That is on Friday I am referring to, you mean the second day following this time?

A. Yes, he was going to repair these horns on the yarder for me.

Q. Who was going to do that? A. Sheldon.

Q. Anybody else?

A. Charley Dake was going to go with him.

Q. What was he going with him for?

A. Well, for a little hunt.

Q. Personal matter entirely? A. Yes.

Q. Had nothing to do with the logging operation or the labor or any of this equipment? A. No.

Q. Well, was this the result of the conversation?

A. Yes. [30]

Q. Where did that conversation occur?

Plaintiff's Exhibit No. 12—(Continued)
(Testimony of Harold Edward Wells.)

A. In the seat of the pick-up as we were leaving the woods. [31]

Q. He heard whatever was said about Corwin taking the car on the following Sunday?

A. Yes.

Q. —and going to do this work for you?

A. Yes.

Q. Well, what happened after that?

A. He came down and picked me up.

Q. You refer to Dake?

A. Yes; I got in the pick-up and went home, he took the pick-up back to Gales Creek and left it there that night; from then on this other trip started.

Q. Now, did he have any authority or permission from you to use the car on Sunday?

A. Absolutely no.

Q. Was he in your employ on Sunday, Sunday the 28th? A. He was not.

Q. Did he have anything to do in the line of your employ [33] with the use of that car on Sunday the 28th? A. He did not.

Q. Had you ever allowed your men the use of the car without your special permission?

A. No.

Q. And did Dake know that? A. Yes.

Q. Had Dake ever used the car before, before this time? A. Only when I told him to.

Q. And not otherwise?

A. No, absolutely not.

Plaintiff's Exhibit No. 12—(Continued)
(Testimony of Harold Edward Wells.)

Q. Upon what occasions had he used the car?

A. Well, work for me such as running errands for me in the woods to get this and that and the other.

Q. Had you ever allowed him to use the car over private roads down there?

A. Yes, I did last summer.

Q. That was by special permission, that was over private roads? A. Yes.

Q. Not on public highways?

A. Never left up there with it at all.

Q. What was the purpose of those trips?

A. Hunting.

Q. That was used last summer?

A. Last summer.

Q. But since that time has he used the car for any occasion of that kind? [34] A. No.

Q. Well now, you know of this unfortunate accident that occurred on the 28th? A. Yes, sir.

Q. You know where it occurred? A. Yes.

Q. When did you first learn of that accident?

A. Ten o'clock the following Monday morning; I don't know exactly the date.

Q. Going back to the car, you say that he didn't have your permission or authority, express or implied in any way, shape or form, to use that car on the day of the accident? A. No.

Q. And it was to be used solely by Mr. Corwin, trip on his own private business? A. Yes. except that he was to go up with him on a hunting

Plaintiff's Exhibit No. 12—(Continued)
(Testimony of Harold Edward Wells.)

Q. And Corwin was—or Sheldon was to drive the car? A. Yes.

Q. Had Mr. Dake ever taken your car or used it without your permission and knowledge, express or implied, before this time, on the 28th of June?

A. No, not that I know of.

Q. Did he have any right to use the car on Sunday, the 28th, referring to Dake? A. No.

[35]

Q. Now, on this Sunday morning Sheldon was to go up and repair this horn? A. Yes.

Q. And, of course, in repairing the horn he had permission, he or Dake, whichever one was to drive it, I don't suppose that made such difference to you, to get up and have that horn [49] fixed, they had a right to use the truck for that purpose?

A. Sheldon did.

Q. He had to fix the horn?

A. That is right.

Q. Of course, you knew *what* Dake was going to go, he told you? A. Yes.

Q. You gave him the gun?

A. I loaned him the gun.

Q. Was he going to work on the horn up there too?

A. Not that I know of; he might have went and helped him with it.

Q. But he at least had permission to ride up that far with Sheldon for the purpose of hunting?

A. Yes. [50]

Plaintiff's Exhibit No. 12—(Continued)
(Testimony of Harold Edward Wells.)

Re-cross Examination

By Mr. Wood:

Q. Mr. Wells, you were here this morning when Mr. Norblad made his opening statement, were you not? A. Yes.

Q. Did you hear him say that Dake, Charles Dake, practically stole the pick-up, that would be the evidence in this case?

A. I didn't hear him say that.

Q. You heard that statement? A. Yes.

Q. Do you want to go on record as subscribing to that same statement made by your attorney, that Charles M. Dake stole this pick-up?

A. I think so.

Q. At the time of the accident? A. Yes.

Mr. Wood: That is all.

(Witness excused.) [58]

CHARLES M. DAKE,

called as a witness on behalf of the defendant, and being sworn, testified as follows: [60]

A. He didn't tell me I could drive it at all that day, I didn't ask him for it. [62]

Q. Did you have any permission or authorization from him either impliedly or explicit in any way to use the car on Sunday the 28th? A. No.

Q. You drove it without his permission, without his authorization and without his knowledge, then?

Plaintiff's Exhibit No. 12—(Continued)
(Testimony of Charles M. Dake.)

A. Yes.

Q. What time did you take the car?

A. I don't remember the exact time.

Q. Just about?

A. Well, I imagine it was after breakfast.

Q. Approximately what time?

A. Oh, around seven o'clock.

Q. About seven o'clock?

A. Yes, or eight, maybe.

Q. Where did you take the car?

A. I drove it up to where the logging road turned off, drove it up into the woods.

Q. Was that off the Wolf Creek highway?

A. Yes.

Q. How far off the Wolf Creek highway?

A. About six or seven miles, something like that.

Q. Did you go hunting? A. Yes.

Q. What did you do after that?

A. I came back to Gales Creek.

Q. What time was it then?

A. Well, I don't know what time it was. [63]

Q. Well, approximately?

A. It was in the forenoon, somewhere nine or ten o'clock, maybe around ten I imagine.

Q. What did you do after that?

A. Well, I stayed around there for awhile, then Mr. and Mrs. Adkins was going to have some people for lunch that day, extra, I had an early lunch, around 11 or 11:30, I got in the pick-up and drove it off straight for the Coast.

Plaintiff's Exhibit No. 12—(Continued)
(Testimony of Charles M. Dake.)

Q. Over to the Coast, you mean over the Wolf Creek highway towards Tillamook? A. Yes.

Q. What were you going to Tillamook for?

A. Well, I was just going over there on a trip.

Q. Pleasure trip of your own? A. Yes.

Q. Did you have any purpose in going over there, any business relations with Mr. Wells or for Mr. Wells or for his business, in any way, shape or form whatsoever? A. No.

Q. Purely a pleasure trip of your own?

A. Yes, in a way it was.

Q. Well, was it in any other way?

A. No, well, I did think about a cousin of mine that he could go to work there if he wanted to, but I never said anything to Mr. Wells about it; I was going to tell Mr. Wells that he would go to work for him.

Q. Were you authorized to speak, did Mr. Wells ever [64] authorize you to speak to him?

A. He never knew of him.

Q. That was just in your own mind then?

A. Yes.

Q. You didn't go over there for that purpose?

A. No, not especially.

Q. Tell us what you did on that trip?

A. Well, going on, I rode up the highway a ways, I seen a man and two women walking along the highway.

Q. On the way to Tillamook?

Plaintiff's Exhibit No. 12—(Continued)
(Testimony of Charles M. Dake.)

A. Yes. I stopped and asked them if they wanted to ride. They said "Yes". One of these girls got in the front seat with me and the man and this other woman got in the back of the pick-up. I asked her where they were going. She said they were going to Tillamook. I said I guessed I would go to Tillamook too. I went over to Tillamook with them. After we got to Tillamook I drove down to my Uncle's place, down there for awhile, then we started out. I said, "Well, I am going to go back over to Gales Creek; if you folks want to go with me we will go around the other way and come up through towards Seaside and across," so that is the way we came. We came up as far as Twin Rocks, we stopped there and drove down onto the beach and stayed there for awhile.

Q. Have something to drink?

A. Yes, we had a little bit. We gave a lot of time down on the beach, it must have been dark.

Q. Did you go to see your cousin?

A. Yes, he wasn't there. [65]

Q. Did you know these people that you picked up? A. Never seen them before.

Q. Did they drive back with you?

A. Yes, they came back with me.

Q. During all this time you were driving Mr. Wells' car, this pick-up, without any permission or authorization, and without his knowledge and consent, that is correct, isn't it? A. Yes.

Q. And he didn't know that you were going to

Plaintiff's Exhibit No. 12—(Continued)
(Testimony of Charles M. Dake.)

use, and he hadn't given you any permission to use the car on Sunday at all?

A. No, I never had asked him for it.

Q. Now, what is the fact, was he in the habit of allowing you to use the car without his permission?

A. No, I used it a time or two, but he didn't know it.

Q. You did it without his permission?

A. Without asking for it.

Q. He was very careful to not give to anybody the use of the car, was he not? A. Yes.

Q. And you, as well as the other employees, understood you couldn't drive that car at all without his permission or his special permission and authorization?

A. We knew we weren't supposed to.

Q. You knew you weren't supposed to use that car on Sunday or any other day without his express permission? A. Yes. [66]

Q. You didn't tell him you were going to Tillamook? A. No.

Q. He knew nothing about it?

Mr. Hesse: Your Honor, I object again, all of those questions are so leading.

The Court: Yes, they are quite leading.

Q. (By Mr. Norblad) Did he know anything about your going to Tillamook?

A. No.

Q. Did he know anything about this cousin of yours down there? A. No.

Plaintiff's Exhibit No. 12—(Continued)
(Testimony of Charles M. Dake.)

Q. Had you ever discussed this cousin with him or the possibility of getting a job with him?

A. We never had.

Q. And then on the way back this wreck occurred? A. Right.

Q. This unfortunate wreck? Did you have any authority from Mr. Wells to hire anybody?

A. No.

Q. Were you ever given any permission or authority by Mr. Wells at any time to take this pick-up truck on business or pleasure of your own?

A. Not off of the woods road up there.

Q. What do you mean by that?

A. I have drove it down a half mile or so to where the gasoline is dumped off, pick up the gasoline over there and bring it back to the tanks. [67]

Q. That was in connection with his business?

A. Yes.

Q. But I am referring to the times when it wasn't in connection with his business, did he ever give you permission to drive the car excepting when it was on his own business?

A. Well, once or twice last year, last fall during hunting season.

Q. Was that permission to drive it over the public roads of this state or private roads?

A. Private.

Q. Did you ever ask him to use the truck to go on any business or affairs of your own?

Plaintiff's Exhibit No. 12—(Continued)
(Testimony of Charles M. Dake.)

A. No.

Q. Did you ever use it without his permission?

A. Yes.

Q. When? A. Well——

Q. (Interrupting) Or without his knowledge, both?

A. I used it several evenings after work, after supper down there, drove up the highway a mile or two to fish, and then on Saturday before this accident I drove it to Hillsboro to the dentist and had my teeth pulled.

Q. Did he know anything about your having trouble with your teeth? A. No.

Q. Did he authorize you to use the car?

A. No. [68]

Q. You did it without his permission and *with* his knowledge or without his consent?

A. Yes.

Q. Were those the only times—do you know whether he knew about your having used the car without his consent or permission?

A. Well, I don't think he did.

Q. As far as you know he didn't know?

A. That is right.

Q. Did you have any work to do in connection with Mr. Wells' business on Sunday the day of the accident, of any kind at all? A. No. [69]

Plaintiff's Exhibit No. 12—(Continued)

CORWIN SHELDON,

called as a witness on behalf of defendants, and being sworn testified as follows:

Direct Examination: [104]

Q. You don't know anything about that feature of it at all? A. No, I don't. [107]

Q. Now, then, between Glenwood and Gales Creek did you and Dake have any conversation about his hunting?

A. Oh, he said something about if a game warden came up there tell him he was supposed to be helping me, or something of the kind.

Q. He asked you that? A. Yes.

Q. Tell the jury as near as you can just what was said.

A. Well, he just said if anybody comes up there you tell them I am supposed to be helping.

Q. Did you respond to that?

A. No, I never said nothing to him.

Q. Was he to help you in any way?

A. No, he wasn't to help me at all.

Q. Did you make any arrangements as to any time when you were going to meet at Gales Creek?

A. I told him I would be down just as early as I could; I didn't get there until——

Q. (Interrupting) That was while Wells was there, the three of you were there?

A. No, Chuck asked me what time I would be going up, I told him I didn't know for sure, but just as soon as I could.

Plaintiff's Exhibit No. 12—(Continued)
(Testimony of Corwin Sheldon.)

Q. When you speak of "Chuck", you refer to Mr. Dake? A. Yes.

Q. You told him you would be down there just as soon as you could?

A. Just as early as I could.

Q. Did you go down there Sunday morning, the 28th? [108] A. Yes.

Q. What time did you get there?

A. Oh, it was pretty close to noon when I got down there.

Q. Was the pick-up truck there?

A. No, the pick-up was gone.

Q. Did you know who had taken the pick-up?

A. No, I never stopped, I just drove up there and the pick-up was gone, so I went on.

Q. When did you first learn that Mr. Dake had taken the pick-up?

A. Oh, it was about noon the following Monday, we were eating dinner.

Q. Do you know what Mr. Wells' rule was with reference to the use of that pick-up, whether anybody could use it without his permission, or not?

Mr. Wood: There is no rule pleaded, your Honor, no rule or custom pleaded.

Mr. Norblad: Don't have to plead customs under those circumstances, no necessity of pleading it.

The Court: I think I will let you answer.

(Whereupon the question was read by the Reporter.)

Plaintiff's Exhibit No. 12—(Continued)
(Testimony of Corwin Sheldon.)

A. As far as I know, as long as I worked for him nobody ever did use it unless he told them to, sent them to do something for him.

Q. Did the employees all understand that, did they discuss it among themselves?

A. Yes, they never used it. [109]

Q. Did you know that employees didn't use it without his permission?

A. As far as I know they never did, I know I never did.

Q. On this occasion when you three were together did Mr. Wells give Mr. Dake any permission to use the truck on Sunday?

Mr. Wood: As far as he knows.

Q. (Mr. Norblad) Well, in their conversation?

A. No, I never heard him say anything about it at all.

Q. It was evidently understood that you were to use the truck and drive it and nobody else was to have it?

A. That was the understanding, I was to take it, he told me to take it.

Q. —that nobody else was to take it?

A. No.

Q. By the way, there was no camp up at the operations where you were? A. No. [110]

[Endorsed]: Filed Oct. 14, 1943. Paul P. O'Brien, Clerk.

EXHIBIT "D"

In the Circuit Court of the State of Oregon
For Clatsop County

EDWARD J. JASPER, etc., et al,

Plaintiff,

vs.

HAROLD E. WELLS and CHARLES M. DAKE,
Defendants.

SPECIAL FINDINGS

We, the Jury in the above entitled cause, make answer to the following requested special findings as follows:

1. Was defendant Dake at the time of the collision driving said pick-up delivery truck as the agent, servant or employee of defendant Wells in pursuance of Wells' business? Yes.

2. Or, was defendant Dake at the time of the collision driving said pick-up delivery truck either with the express or with the implied permission or consent of defendant Wells on defendant Dake's own business? No.

3. Or, was defendant Dake at the time of the collision driving said pick-up delivery truck entirely without the permission or consent of defendant Wells and entirely on defendant Dake's own business? No.

HAROLD W. BELL

Foreman

[Endorsed]: Filed Oct. 14, 1943. Paul P.
O'Brien, Clerk.

[Endorsed]: No. 10580. United States Circuit Court of Appeals for the Ninth Circuit. Hartford Accident and Indemnity Company, a corporation, Appellant, vs. Edward J. Jasper, Administrator of the Estate of Emmett C. Jasper, deceased, Albert Brown and Charles M. Dake, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the District of Oregon.

Filed October 14, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10580

HARTFORD ACCIDENT AND INDEMNITY
COMPANY, a corporation,

Appellant,

vs.

EDWARD J. JASPER, Administrator of the Es-
tate of Emmett C. Jasper, deceased; ALBERT
BROWN; and CHARLES M. DAKE;

Appellees.

APPELLANT'S STATEMENT OF POINTS ON
WHICH IT INTENDS TO RELY ON AP-
PEAL

1. The Court erred in failing to find in favor of plaintiff and enter declaratory judgment accordingly;

2. The Court erred in failing to find that Dake was on a personal mission of his own at time of accident and that his "actual use" of the truck was without permission of the named insured;

3. There is no competent substantial evidence to support the finding and conclusion of law based thereon that the "actual use" of the truck by Dake at the time of the accident was with permission of the named insured;

4. The Court erred in failing to construe the provisions of the policy of insurance and particularly the meaning of the words "actual use" con-

tained in the omnibus provision thereof relating to additional insureds under paragraph 3 of insuring agreements headed "Definition of Insured";

5. The Court erred in failing to make a special finding of fact as to whether Dake's assumed permission to use the truck was an implied permission or an express permission and in failing to state a separate conclusion of law based on either one or the other of such findings of fact as required by Rule 52 of Federal Rules of Civil Procedure;

6. The Court erred in failing to make a finding as to whether the original taking of the truck on the day of the accident was with permission of the named insured and whether the truck was being used at the time of the accident for the same purpose it was taken and if not being used for the same purpose, whether there was a slight or substantial deviation therefrom and in the absence of such findings there is no basis for the legal conclusions entered and no way of telling what legal principle the judgment entered is based upon.

7. The Court erred in its finding and conclusion of law that the same matter was not adjudicated in the State action as to defendant Edward J. Jasper, Adm. of the Estate of Emmett C. Jasper, deceased;

8. There is no competent evidence to support the finding that Dake was using the insured truck at the time of the accident with permission of the

named insured so as to constitute Dake an additional insured under the provisions of the policy.

Submitted by,

JAMES ARTHUR POWERS

Attorney for Appellant

Due service of the foregoing, Appellant's Statement by receipt of a duly certified copy thereof, in Multnomah County, Oregon, on the 15th day of October, 1943 hereby is accepted.

ROBERT S. MILLER

Of Attorneys for Appellees

[Endorsed]: Filed Oct. 18, 1943. Paul P. O'Brien, Clerk.